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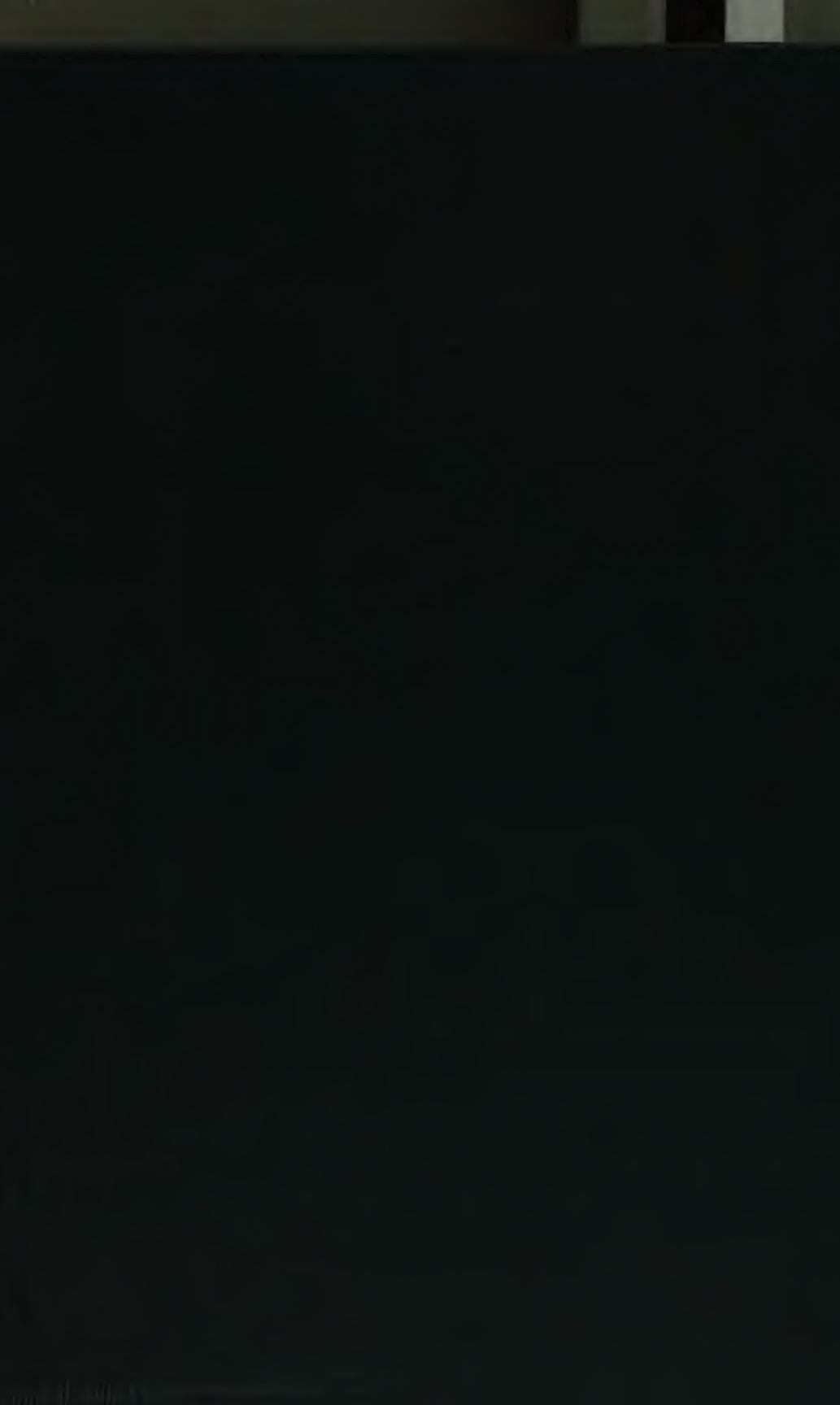
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TABLE

OF

LEADING ARTICLES.

American Rights in the Behring Sea. LOUIS BOISOT, JR.	625
Ballot Box, The Right of the Federal Courts to Punish Offenders against. D. H. PINGREY	337
Charitable Associations, Liability of, for Negligence, and the effect of the Motive of a Founder. RICH- ARD C. MCMURTRIE	209
Christianity and the Common Law. A. H. WINTER- STEEN	273
Equitable Easements. SHERRERD DEPUE	73
Legal Holidays. JOHN B. UHLE	137
Louisiana, Laws of, and their Sources. HON. E. T. MERRICK	I
Microscope, The, and The Camera in the detection of Forgery. MARSHALL D. EWELL	553
Original Package, an, the Law Governing. JOHN B. UHLE	409, 721, 797

NAMES OF WRITERS.

Boisot, Louis, Jr.	. . . . .	625
Childs, C. H.	. . . . .	380
Depue, Sherrerd	. ,	73
Ewell, Marshall D.	. . . . .	553
Gest, John Marshall	. . . . .	221
Kelly, Jno. F.	. . . . .	24
McMurtrie, Richard C.	. . . . .	209
Merrick, Hon. E. T.	. . . . .	1
Pingrey, D. H.	. . . . .	337
Sellers, James C.	42, 69, 133, 195, 202, 267, 331, 405, 585, 621, 719, 771	
Thornton, W. W.	. . . . .	102, 872
Uhle, John B.	60, 137, 239, 409, 489, 490, 544, 718, 721, 797	
Waples, Rufus	. . . . .	127
Watts, Ernest	. . . . .	257, 391, 546, 596, 637, 792
Wintersteen, A. H.	. . . . .	321

TABLE OF CASES.

CASES IN *italics* ARE REPORTED IN FULL.

- Aitcheson v. The Endless Chain Dredge, 133. 40 Fed. Repr. 253. (Va.)
- Alexander v. State, 134. 12 S. W. Repr. 595. (Tex.)
- American Cable Ry. Co. v. Chicago City Ry. Co. *et al.*, 551. 41 Fed. Repr. 522. (Ill.)
- American Telephone and Telegraph Co. v. Smith, 208. 18 Atl. Repr. 910. (Fla.)
- Anderson v. Jett, 203. 12 S. W. Repr. 670. (Ky.)
- Annapolis and B. S. L. RR. Co. v. Pumphrey, 207. 72 Md. 82.
- Arkansas Valley Smelting Co. v. Cowenhaven *et al.*, 796. 41 Fed. Repr. 450. (Colo.)
- Armstrong, *In re*, 548. 41 Fed. Repr. 381. (Ohio.)
- Ash v. Baltimore and Ohio RR. Co., 408. 72 Md. 144.
- Ashton v. Dashaway Asso., 70. 84 Cal. 61.
- Atchison, T. and S. F. RR. Co. v. Cochran, 335. 43 Kans. 225.
- Bailey v. Davis, 623. 23 Pac. Repr. 881. (Or.)
- Bain v. Richmond and D. RR. Co., 622. 105 N. C. 363.
- Baird v. St. Louis, I. M. & S. Ry. Co., 549. 41 Fed. Repr. 592. (Ark.)
- Barber Asphalt Paving Co. v. City of New Orleans, 207. 41 La. Ann. 1015.
- Barhurst *et ux.* v. Armstrong *et al.*, 550. 42 Fed. Repr. 2. (Ohio.)
- Barrett v. Market St. C. Ry. Co., 191. 81 Cal. 296.
- Beard v. Illinois Central RR. Co., 332. 79 Iowa 518.
- Beaver v. Beaver, 270. 117 N. Y. 421.
- Beideman v. Atlantic City RR. Co., 624. 19 Atl. Repr. 731. (N. J.)
- Beine, *In re*, 794. 42 Fed. Repr. 545. (Kans.)
- Bell v. Boyd, 331. 76 Tex. 133.
- Bennett v. Chapin, 136. 77 Mich. 526.
- Black v. Ashley, 405. 44 N. W. Repr. 1120. (Mich.)
- Block v. Valley Mnt. Ins. Asso., 135. 12 S. W. Repr. 477. (Ark.)
- Borgards v. Farmers' Mut. Ins. Co., 333. 44 N. W. Repr. 856. (Mich.)
- Borough of Sandy Lake v. Forker, 71. 130 Pa. 123.
- Boylan v. Hot Springs RR. Co., 72. 132 U. S. 146.
- Brennan v. Gordon, 271. 118 N. Y. 489.
- Bright *et al.* v. Land and River Imp. Co. *et al.*, 795. 42 Fed. Repr. 479. (Wis.)
- Budd v. Power, 69. 22 Pac. Repr. 499. (Mont.)
- Buie v. Buie, 331. 7 S. Repr. 344. (Miss.)
- Burt v. Quisenberry, 720. 132 Ill. 385.
- Burlon v. Tuile, 49. 78 Mich. 363.
- Cady v. Bradshaw, 203. 22 N. E. Repr. 371. (Ky.)
- Cartin v. Hammond, 552. 24 Pac. Repr. 627. (Mont.)
- Cawthorn v. Perry, 333. 76 Tex. 383.
- Catalonia, The, 795. 43 Fed. Repr. 396. (Mass.)
- Central Nat. Bank v. Dreydoppel, 405. 19 Alt. Repr. 689. (Pa.)

- Chase v. Cox**, 795. 41 Fed. Repr. 475 (Pa.)
Chicago City Ry. Co. v. Wilcox, 623. 24 N. E. Repr. 419. (Ill.)
Chippewa Lumber Co. v. Phoenix Ins. Co., 406. 44 N. W. Repr. 1055. (Mich.)
Christian v. Atlantic & N. C. RR. Co., 271. 133 U. S. 233.
City of Philadelphia v. Western Union Tel. Co., 136. 40 Fed. Repr. 615. (Pa.)
Cleveland, Mayor of Jersey City, *vs.* 268. 19 Atl. Repr. 17. (N. J.)
Cole v. Cunningham, 268. 133 U. S. 107.
Collins v. Hills et al., 483. (Iowa.)
Commonwealth v. Gardner, 405. 133 Pa. 284.
Commonwealth v. Miller, 207. 131 Pa. 118.
Continental Life Ins. Co. v. Chamberlain, 135. 132 U. S. 304
Coors v. German Nat. Bank, 331. 23 Pac. Repr. 328. (Colo.)
Corbin v. Gould, 336. 133 U. S. 308.
Corcoran v. Snow Cattle Co., 331. 23 N. E. Repr. 727. (Mass.)
Cookery v. Nagle, 205. 10 S. E. Repr. 491. (Ga.)
Cotten v. Fidelity & Casualty Co., 794. 41 Fed. Repr. 506. (Miss.)
Cottrill v. Crum, 719. 100 Mo. 397.
Crew v. The Bradstreet Co., 408. 19 Atl. Repr. 500. (Pa.)
Cronkhite v. Travelers' Ins. Co., 133. 75 Wis. 116.
Crooks v. Nippolt, 549. (Minn.)
Crosby v. The Lillie, 547. 42 Fed. Repr. 179, 237. (Fla.)
Cross v. State of N. C., 71. 132 U. S. 131.
Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co. et al., 550-1. 42 Fed. Repr. 273. (Tenn.)
Cunningham, Sheriff, v. Neagle, 658. 135 U. S. 1.
Davis v. Hendricks, 336. 99 Mo. 478.
Davis v. Strange's Exor., 622. 11 S. E. Repr. 406. (Va.)
De Forest v. Thompson, 135. 40 Fed. Repr. 185. (W. Va.)
De Witt et al. v. Berry et al., 552. 134 U. S. 306.
Dean v. Pennsylvania RR. Co., 71. 129 Pa. 514.
Dean v. St. Paul Union Depot Co., 22. 41 Minn. 360.
Deposit Bank of Owensboro v. Davies County Court, 267. 12 S. W. Repr. 930. (Ky.)
Deposit Bank of Georgetown v. Fayette Nat. Bank, 405. 13 S. W. Repr. 339. (Ky.)
Detroit Home and Day School v. City of Detroit, 136. 76 Mich. 521.
Dick v. Flanagan, 269. 122 Ind. 277.
Dierstein v. Schubkagel, 205. 131 Pa. 46.
Dixon v. Cooper, 136. 88 Tenn. 177.
Dole v. Sherwood, 133. 41 Minn. 535.
Dolloff v. Phoenix Ins. Co., 333. 82 Me. 266.
Dowell v. Guthrie, 272. 99 Mo. 653.
Eaton v. Cleveland, St. L. & K. C. Ry. Co. et al., 550. 41 Fed. Repr. 421. (Mo.)
El Modelo Cigar Manf'g Co. v. Gato, 208. 25 Fla. 886.
Elizabethtown Gas-Light Co. v. Green, 204. 18 Atl. Repr. 844. (N. J.)
Emery v. Ohio Candle Co., 719. 24 N. E. Repr. 660. (Ohio.)
Empire Passenger Ry. Co.'s Appeal, 406. 19 Atl. Repr. 629. (Pa.)
Eschrick's Este., *in re*, 550. (Cal.)
Evans v. Opperman, 407. 76 Tex. 293.
Evans et ux. v. State Nat. Bank of New Orleans, 547. 134 U. S. 330.
Exchange Bank of Dallas v. Tuttle, 331. 23 Pac. Repr. 241. (N. M.)
Farmers' and Traders' Bank v. Bank of Allen Co., 133. 12 S. W. Repr. 545. (Tenn.)
Farve v. Louisville & N. R. Co., 795. 42 Fed. Repr. 441. (Miss.)
Field et al. v. Drew Theological Seminary, 548. 41 Fed. Repr. 371. (Del.)
Fifth Nat. Bank of Providence v. Navassa Phosphate Co., 267. 119 N. Y. 256.
Finks, *in re*, 552. 41 Fed. Repr. 383. (Va.)
Finnegan v. Detroit Free Press Co. 333. 78 Mich. 659.

- First National Bank v. Forest, 206.
 40 Fed. Repr. 705. (Iowa.)
 First National Bank of Charlotte v.
 Morgan, 69. 132 U. S. 141.
 Flanigan v. Phelps, 133. 42 Minn.
 186.
 Frick Co. v. Ketels, 71. 42 Kans.
 527.
 Friend v. City of Pittsburgh, 206.
 131 Pa. 305.
 Frishman v Insurance Cos. 796. 41
 Fed. Repr. 449. (Kans.)
 Fritts v. Palmer, 134. 132 U. S.
 282.
 Frost *et al.* v. Rindskopf, 796. 42
 Fed. Repr. 408. (N. Y.)
 Gale Mfg Co. v. Phillips, 133. 78
 Mich. 86.
 Gardiner v. Gardiner, 624. 19 Atl.
 Repr. 651. (N. H.)
 Gibson Co. v. Pullman Smith Car
 Co., 793. 42 Fed. Repr. 572.
 (Tenn.)
 Gilbert v. Judson, 552. 24 Pac.
 Repr. 643. (Cal.)
 Gilmore's Estate, 72. 81 Cal. 240.
 Goldberger v. Phila. Grocer Pub.
 Co., 550. 42 Fed. Repr. 42.
 (N. Y.)
 Goodrich v. McDonald, 133. 77
 Mich. 486.
 Gosnell v. State, 134. 12 S. W.
 Repr. 392. (Ark.)
 Goulds v. Brophy, 207. 42 Minn.
 109.
 Graham v. Grugan, 336. 132 Pa.
 79.
 Grant v. Diebold Safe and Lock
 Co., 592. 45 N. W. Repr. 951.
 (Wis.)
 Gravely v. Gravely, 796. 42 Fed.
 Repr. 265. (Va.)
 Graves v. Corbin, 207. 132 U. S.
 571.
 Grusendorf v. Howat, 489. 45
 N. W. Repr. 407. (Iowa.)
 Gulf C. & S. F. Ry. Co. v. Levi,
 203. 76 Tex. 337.
 Gunther *et al.* v. Liverpool L. &
 G. Ins. Co., 549. 134 U. S. 110.
 Hall v. Pillsbury, 267. 43 Minn.
 33.
 Halpin v. Aetna Fire Ins. Co., 622.
 120 N. Y. 70.
 Halpin v. Ins. Co. of North Amer-
 ica, 622. 120 N. Y. 73.
 Hans v. Louisiana, 548. 131 U. S. 1.
 Harland v. United Lines Tel. Co.,
 134. 40 Fed. Repr. 302. (Conn.)
 Harmon, *In re*, 793. 43 Fed. Repr.
 372. (Miss.)
 Harrison v. Woman's Homeopathic
 Hospital, 623. 19 Atl. Repr.
 804. (Pa.)
 Hazlett v. Commercial National
 Bank, 267. 132 Pa. 118.
 Helmer v. Commercial Bank, 267.
 44 N. W. Repr. 482. (Neb.)
 Herreshoff v. Boutineau, 406. 19
 Atl. Repr. 712. (R. I.)
 Hess' Appeal, 406. 19 Atl. Repr.
 434. (Pa.)
 Hinckley v. Horazdowsky, 623. 24
 N. E. Repr. 421. (Ill.)
 Hiram Holt Co. v. Wadsworth, 336.
 41 Fed. Repr. 34. (N. Y.)
 Hise v. Hartford Life Ins. Co., 407.
 13 S. W. Repr. 367. (Ky.)
 Holmes v. Briggs, 204. 131 Pa.
 233.
 Home Ins. Co. v. Stone River Nat.
 Bank, 269. 88 Tenn. 369.
 Hotchkiss v. Phoenix Ins. Co. of
 Brooklyn, 407. 44 N. W. Repr.
 1106. (Wis.)
 Hume v. U. S., 204. 132 U. S. 406.
 Hume v. Michigan Cent. RR. Co.,
 335. 44 N. W. Repr. 502. (Mich.)
 Huschle v. Morris, 268. 131 Ill.
 587.
 Illinois C. RR. Co. v. Bosworth,
 118. 133 U. S. 92.
 Illinois Mut. Ins. Co. v. Hoffman,
 622. 132 Ill. 522.
In re Jackson, 134. 40 Fed. Repr.
 372. (Kans.)
Inhabitants of The Township of
Bernards v. Morrison, 376. 133
 U. S. 523.
 Insurance Co. of North America
 v. Easton, 31. 73 Tex. 167.
 Jackson, *In re*, 134. 40 Fed. Repr.
 372. (Kans.)
 Jacobs v. Mitchell, 268. 22 N. E.
 Repr. 768. 46 Ohio St. 601.
 Jerdee v. Cottage Grove Fire Ins.
 Co., 270. 75 Wis. 345.
 Jockheck *et als.* *In re*, 794. 42 Fed.
 Repr. 545. (Kans.)
 Jones v. Nicholl, 206. 82 Cal. 32.
 Justice v. Justice's Ex'rs, 70. 18
 Atl. Repr. 674. (N. J.)
 Kane v. Barstow, 69. 42 Kans. 465.
 Keller *et al.* v. Taylor, 550. 7 S.
 Repr. 907. (Ala.)
 Kemmitt v. Adamson, 552. 46 N.
 W. Repr. 327. (Minn.)
 Kerigan v. Southern Pac. RR. Co.
 72. 82 Cal. 248.

- Kieffer, *ex parte*, 133. 40 Fed. Repr. 399. (Kans.)
 King v. City of Oshkosh, 334. 75 Wis. 517.
 Kinnaird v. Standard Oil Co., 336. 12 S. W. Repr. 937. (Ky.)
 Knox's Appeal, 208. 131 Pa. 220.
 Lankershire Ranch Land & Water Co. v. Herberger, 332. 82 Cal. 600.
 Larmour v. Rich, 72. 71 Md. 369.
 Lee v. Agricultural Ins. Co. 269. 79 Iowa 379.
 Lee v. Simpson, 793. 42 Fed. Repr. 434. (S. C.)
 Leisy *et al.* v. Hardin, 490, 491. 135 U. S. 100.
 Lewy v. Gillard, 407. 76 Tex. 400.
 Lilas v. State, 271. 88 Ala. 139.
 Lillie, The, 547. 42 Fed. Repr. 179, 237. (Fla.)
 Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co. *et al.* 548. 41 Fed. Repr. 559. (Ark.)
 Loeb v. American Cent. Ins. Co., 134. 99 Mo. 50.
 Louisville & N. R.R. Co. v. Gilbert, 268. 88 Tenn. 430.
 Louisville & N. R.R. Co. v. Sheets, 335. 13 S. W. Repr. 248. (Ky.)
 Lund v. Hersey Lumber Co., 271. 41 Fed. Repr. 202. (Minn.)
 Lusby v. Atchison T. & S. F. Ry. Co., 335. 41 Fed. Repr. 181. (Colo.)
 McClung v. Dearborne, 408. 19 Atl. Repr. 698. (Pa.)
 McCormack v. The Wensleydale, 552. 41 Fed. Repr. 602. (N. Y.)
 McCullough's Adm'r v. Anderson, 720. 13 S. W. Repr. 353. (Ky.)
 McCullough v. Expressman's Mutual Ben. Assn., 334. 133 Pa. 142.
 McDonald v. Chicago, M. & St. P. Ry. Co., 135. 75 Wis. 121.
 McGuire v. Ringrose, 202. 41 La. Ann. 1029.
 McKensie v. Harrison, 623. 120 N. Y. 260.
 McLaughlin v. Clausen, 547. (Cal.)
 McMullen *et al.* v. Richie, 550. 41 Fed. Repr. 502. (Ohio.)
 McVickar v. McVickar, 332. 19 Atl. Repr. 249. (N. J.)
 Malcom v. Richmond & D. R.R. Co., 624. 106 N. C. 63.
 Manning v. French, 270. 133 U. S. 186.
 Marshall v. Whitney *et al.*, 793. 43 Fed. Repr. 343. (Ind.)
 Mason v. Pewabic Mining Co., 204. 133 U. S. 50.
 Mattison v. Farnham *et al.*, 551. 46 N. W. Repr. 347. (Minn.)
 Memphis & L. Ry. Co. v. Kerr, 135. 12 S. W. Repr. 329. (Ark.)
 Metropolitan Life Ins. Co. v. Dempsey, 407. 10 Atl. Repr. 642. (Md.)
 Metz. v. California South. Ry. Co., 548. 54 Pac. Repr. 629. (Cal.)
 Meyer v. Herrera, 205. 41 Fed. Repr. 65. (Tex.)
 Miller, *Ir. re*, 794. 42 Fed. Repr. 307. (S. C.)
 Miller's Adm'r v. Potterfield, 720. 11 S. E. Repr. 486. (Va.)
 Miller v. St. Paul City Ry. Co. 272. 42 Minn. 454.
 Minnick v. Union Ins. Co., 136. 40 Fed. Repr. 369. (Mich.)
 Missouri Pacific Ry. Co. v. Texas & P. Ry. Co., 548, 551. 41 Fed. Repr. 913, 917. (Ind.) (La.)
 Mittel v. Karl, 622. 24 N. E. Repr. 552. (Ill.)
 Moletor v. Sinned, 408. 441 N. W. Repr. 1099. (Wis.)
 Moore v. City of Indianapolis, 206. 22 N. E. Repr. 424. (Ind.)
 Morris v. Powell, 839. 25 N. E. Repr. 221. (Ind.)
 Mullin's Appeal, 202. 18 Atl. Repr. 1056. (Pa.)
 Munro v. Smith *et al.*, 793. 42 Fed. Repr. 266. (N. Y.)
 Myers v. Esery, 407. 19 Atl. Repr. 488. (Pa.)
 Myhan v. Louisiana Electric Light and Power Co., 206. 41 La. Ann. 964.
 National City Bank of Brooklyn v. Westcott, 331. 118 N. Y. 468.
 National Exchange Bank v. Cunningham, 269. 22 N. E. 924. (Ohio.)
 New Vienna Bank v. Johnson, 624. 24 N. E. Repr. 503. (Ohio.)
 Newell v. Meyendorff, 332. 23 Pac. Repr. 333. (Mont.)
 O'Donnell v. Johns, 406. 76 Tex. 362.
 O'Leary v. Board of Fire & Water Commissioners, 271. 44 N. W. Repr. 608. (Mich.)
 O'Neil v. Magner, 206. 81 Cal. 631.
 Odum v. Riddick, 205. 104 N. C. 515.

- Oil Well Supply Co. Ltd. v. Exchange Nat. Bank, 203. 131 Pa. 100.
- Opinion of The Justices, 334. 150 Mass. 586.
- Onderkirk v. Central Nat. Bank, 331. 119 N. Y. 263.
- Peck *et al.* v. First Nat. Bank, 792. 43 Fed. Repr. 357 (N. Y.)
- Pelzer Manuf'g Co. v. St. Paul Fire & Marine Ins. Co., 794. 41 Fed. Repr. 271. (S. C.)
- Pennsylvania RR. Co. v. McMullen, 335. 132 Pa. 107.
- Pennsylvania RR. Co. v. Weiller, 766. 19 Atl. Repr. 702. (Pa.)
- People v. Chaplean, 622. 121 N. Y. 266.
- Phoenix Assurance Co. v. Wachter, 333. 132 Pa. 428.
- Pickands, The H. S., 547. 42 Fed. Repr. 239. (Mich.)
- Philadelphia, City of, v. Western Union Tel. Co., 136. 40 Fed. Repr. 615. (Pa.)
- Phoenix Ins. Co. of Brooklyn v. Bowdre, 720. 7 S. Repr. 596. (Miss.)
- Phoenix Ins. Co. v. Tomlinson *et al.*, 794. 25 N. E. Repr. 126. (Ind.)
- Pickens v. Richmond & D. RR. Co., 207. 104 N. C. 312.
- Pickering v. Lieberman, 551. 41 Fed. Repr. 376. (Del.)
- Pickle v. People's National Bank, 331. 12 S. W. Repr. 919. (Tenn.)
- Pike v. Chicago & A. RR. Co., 207. 41 Fed. Repr. 95. (Mo.)
- Plant v. Thompson, 202. 42 Kans. 664.
- Porter Land & Water Co. v. Bas-kin, 795. 43 Fed. Repr. 323. (Cal.)
- Pullman Palace Car v. Lowe, 251. 44 N. W. Repr. 226. (Neb.)
- Quebec Steamship Co. v. Merchant, 334. 133 U. S. 375.
- Quimby v. Boston & M. RR. Co., 386. 150 Mass. 365.
- Randall v. Evening News Assn. 333. 44 N. W. Repr. 783. (Mich.)
- Randall v. Richmond & D. RR. Co., 207. 104 N. C. 410.
- Rapp v. Reehling, 335. 122 Ind. 255.
- Redfield v. Parks, 135. 132 U. S. 239.
- Richards v. Tarr, 71. 42 Kans. 547.
- Richmond v. Blake, 202. 132 U. S. 592.
- Richmond & D. RR. Co. v. Payne, 268. 10 S. E. Repr. 749. (Va.)
- Rio Grande RR. Co. v. Vinet, 206. 132 U. S. 478.
- Rio Grande RR. Co. v. Vinet, 550. 132 U. S. 168.
- Rosentstein *et al.* v. Burns *et al.*, 551. 41 Fed. Repr. 841. (Mass.)
- Rowell v. Western Union Tel. Co., 136. 75 Tex. 26.
- Samuel v. Oliver, 202. 130 Ill. 73.
- Sanders v. Bagwell, 621. 10 S. E. Repr. 946. (S. C.)
- Schandler Bottling Co. v. Welch *et al.*, 794. 42 Fed. Repr. 561. (Kans.)
- Schroeder v. Galland, 408. 19 Atl. Repr. 632. (Pa.)
- Schurtz v. Kerkow, 549. 24 Pac. Repr. 609. (Cal.)
- Schuster v. Rader, 71. 13 Colo. 329.
- Shrop v. Cleveland, St. L. & K. C. Ry. Co. *et al.*, 550. 41 Fed. Repr. 421. (Mo.)
- Sillars v. Collier, 335. 23 N. E. Repr. 723. (Mass.)
- Silver Cord Combination Mining Co. v. McDonald, 334. 23 Pac. Repr. 346. (Colo.)
- Singer Mfg Co. v. Bent, 336. 41 Fed. Repr. 214. (Ill.)
- Singer Mfg Co. v. June Mfg Co., 336. 41 Fed. Repr. 208. (Ill.)
- Small v. Northern Pac. R. Co., 547. 134 U. S. 514.
- Smith v. Bolles, 70. 132 U. S. 125.
- Smith v. Phoenix Ins. Co., 333. 23 Pac. Repr. 383. (Cal.)
- Smithers v. Junker, 203. 41 Fed. Repr. 101. (Ill.)
- Soltan v. Gerdau, 332. 119 N. Y. 380.
- Southern Fertilizer Co. v. Reames, 624. 105 N. C. 283.
- Speiden v. Parker, 270. 19 Atl. Repr. 21. (N. J.)
- Stanley v. McElrath, 69. 22 Pac. Repr. 673. (Cal.)
- State v. Barnes, 204. 10 S. E. Repr. 611. (S. C.)
- State v. City of Perth Amboy, 70. 18 Atl. Repr. 670. (N. J.)
- State v. McClaugherty, 202. 33 W. Va. 250.
- State v. Norfolk & W. RR. Co., 335. 33 W. Va. 440.
- State v. Savage, 334. 7 S. Repr. 183. (Ala.)

- State v. Temple, 549. 134 U. S. 22.
 State v. Willis, 334. 106 N. C. 804.
State ex rel. Weiss v. District School Board of Edgerton, 286. 44 N. W. Repr. 967. (Wis.)
State of Montana ex rel. Thompson v. Kenney, 223. 23 Pac. 733. (Mont.)
 Steel v. Rathbun, 792. 42 Fed. Repr. 390. (Ore.)
 Stephens v. Bernays, 796. 42 Fed. Repr. 488. (Mo.)
 Stevens v. Gregg, 203. 12 S. W. Repr. 775. (Ky.)
 Stewart *et al.* v. Townsend, 552. 41 Fed. Repr. 320. (S. C.)
 Stimson v. Milwaukee L. S. & W. Ry. Co., 335. 75 Wis. 381.
 Stinson v. Geer, 72. 42 Kans. 520.
Streissguth et al. v. National German-American Bank, 634. 43 Minn. 50.
 Supreme Conclave, Royal Adelpbia v. Cappella, 271. 41 Fed. Repr. 1. (Mich.)
 Supreme Council of Chosen Friends v. Bennett, 623. 19 Atl. Repr. 785. (N. J.)
 Sweatt v. Burton, 549. 42 Fed. Repr. 285. (Cal.)
- Taft v. Presidio & Ferries R.R. Co. 70. 84 Cal. 131.
 Taulane, Rebecca A. The, 795. 43 Fed. Repr. 396. (Mass.)
 Territory v. Evans, 332, 333. 23 Pac. Repr. 232. (Id.)
 The Catalonia, 795. 43 Fed. Repr. 396. (Mass.)
 The Katie, 134. 40 Fed. Repr. 480. (Ga.)
 The John G. Stevens, 133. 40 Fed. Repr. 331. (N. Y.)
 Thompson v. Rathbun, 203. 18 Or. 202.
 Tomkins v. Crosby, 405. 19 Atl. Repr. 720. (N. J.)
 Townshend v. Gray, 406. 19 Atl. Repr. 635. (Vt.)
 Traders' Ins. Co. v. Newman, 205. 120 Ind. 554.
 Treahy v. Holliday, 206. 43 Kans. 29.
 Tucker v. Illinois Central R.R. Co., 272. 7 S. Repr. 124. (La.)
- Ulrich *ex parte*, 793. 42 Fed. Repr. 587. (Mo.)
 U. S. v. Barlow, 72. 132 U. S. 652.
 U. S. v. Bayle, 582. 40 Fed. Repr. 664. (Mo.)
 U. S. v. Delaware L. & W. R.R. Co., 134. 40 Fed. Repr. 101. (N. Y.)
 U. S. v. Eureka & P. R.R. Co., 135. 40 Fed. Repr. 419. (Nev.)
 U. S. v. Morsman, 794. 42 Fed. Repr. 448. (Mo.)
 U. S. v. Norsch, 795. 42 Fed. Repr. 417. (Mo.)
 U. S. *ex rel.* Redfield v. Windom, 624. 18 Wash. Law Rep. 287.
 U. S. v. Windmuller *et al.*, 549. 42 Fed. Repr. 292. (N. Y.)
- Velie v. Manufacturers' Accident Indemnity Co., 135. 40 Fed. Repr. 545. (Wis.)
 Walker v. City of Kansas, 272. 99 Mo. 647.
 Walton v. Agricultural Ins. Co., 205. 116 N. Y. 317.
 Waters v. Crabtree, 623. 105 N. C. 394.
 Weisinger v. Cocke, 720. 7 S. Repr. 495. (Miss.)
 Weitz v. Wolfe, 267. 44 N. W. Repr. 482. (Neb.)
 Wells v. New Haven & N. Co., 271. 23 N. E. Repr. 724. (Mass.)
 Western Union Tel. Co. v. Adams, 208. 75 Tex. 531.
 Western Union Tel. Co. v. Eagles (Feegles), 208. 75 Tex. 537.
 Western Union Tel. Co. v. Goodbar, 272. 7 S. Repr. 214. (Miss.)
 Western Union Tel. Co. v. Seay, 203. 132 U. S. 472.
 Western Union Tel. Co. v. Williams, 720. 11 S. E. Repr. 106. (Va.)
Westmoreland and Cambria Natural Gas Co. v. De Witt, 93. 130 Pa. 235.
 Wheeler v. Wayne Co., 720. 73 Ill. 599.
 White v. Cincinnati N. O. & T. P. Ry. Co., 272. 12 S. W. Repr. 936. (Ky.)
 Whittemore v. Amoskeag Nat. Bank, 407. 134 U. S. 527.
 Wibaux v. Grinnell Live Stock Co., 70. 22 Pac. Repr. 492. (Mont.)
 Williams v. Guile, 270. 117 N. Y. 343.
 Williams v. McKay, 204. 18 Atl. Repr. 824. (N. J.)
 Woodburn v. Cincinnati, N. O. & T. P. Ry. Co. 203. 40 Fed. Repr. 731. (Tenn.)
 Woodruff v. Bradstreet Co., 206. 116 N. Y. 217.

Wooldbridge v. Stern, 796. 42 Fed. Repr. 311. (Mo.)	Wygall v. Bigelow, 69. 42 Kans. 477.
Woolstein <i>et al.</i> v. Welch, 793. 42 Fed. Repr. 566. (Kans.)	Young v. Ewart, 72. 132 U. S. 340.
Wrought Iron Range Co. v. Johnson, 621. 11 S. E. Repr. 233. (Ga.)	Youngs v. Youngs, 332. 130 Ill. 230.

NOTE.

The *Old Series* of THE AMERICAN LAW REGISTER is comprised in nine volumes, from November, 1852, to September, 1861, both inclusive; and having been printed from type, it is now out of print, and can only be furnished second-hand.

The *New Series* begins with November, 1861, and has been printed from plates, so that the text can be had in newly-printed volumes. After the Twenty-first Volume, the quality of the paper used was changed, so that second-hand volumes prior to 1883, are not as large and do not correspond with the present volumes. In reprinting, a quality of paper uniform with that in this volume is used, making all volumes of the same size and appearance.

The *New Series* comprises both the *First* and *Second* series: the *First* from November, 1861, to December, 1887, inclusive; the *Second*, from January, 1888, onwards. It was intended by the D. B. Canfield Company to call this *Second Series*, the *Third Series*, and the title page of the volume for 1888 was so lettered. But the present publishers have preferred to keep the titles of the *Old* and *New Series*, and divide the *New Series* into *First* and *Second*, instead of calling the *Old* the *First*, and dividing the *New* into *Second* and *Third Series*.

The First Volume of the Digest covers the period of the *Old Series* and the first *Fourteen Volumes* of the *New Series*: the Second Volume (now in preparation) covers the volumes of the *New Series* from the *Fifteenth* to the *Twenty-sixth*, both inclusive; and the Third Volume will digest the volumes from the *Twenty-seventh* on, comprised in the *Second Series*. By using the last volume of the Digest first, the cross-references will speedily and easily unlock the wealth of legal matter in all the volumes of THE AMERICAN LAW REGISTER.

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THE LAWS OF LOUISIANA, AND THEIR SOURCES.

Read before the New Orleans Academy of Sciences in 1871, and revised for THE AMERICAN
LAW REGISTER.

It is a maxim that all men are presumed to know the law, and that ignorance of the law excuseth no man. This maxim is well enough as it respects offenses *malum in se*, and such questions of right and wrong as one's conscience settles without any elaborate appeal to reason. But when we come to consider regulations which are made merely for convenience, or questions which require the cautious weighing of reasons by the cultivated mind to arrive at what is just, the propriety of the maxim is by no means so clear; yet it is essential to administration of justice.

It is well known that the laws of Spain were the laws of Louisiana at the cession of the territory to the United States in 1803, by the treaty of Paris.

It is true, the country had been settled by the French in 1699, and had continued in the possession of France for seventy years, when O'Reilly took possession of the same in 1769 for Spain, and that the larger part of the inhabitants were of French descent, and that the country had been retroceded to France by the treaty of Ildefonso in 1800, and by that power transferred to the United States, yet the brief possession *de facto* by France from the 30th day of November, A. D. 1803, to the 20th of December of the same year, did not permit the carrying into effect of any material changes in the laws. The only changes made by Lausat, acting for France, was to substitute

a Mayor and Council for the government of New Orleans, in the place of the Cabildo, and to re-establish the black code of Louis XV, prescribing the duties toward and the government of slaves. But as Spain and her Indies were governed by the civil law, which also prevailed in France and Louisiana, the change was not so marked, so far as private rights were concerned, as it was respecting the parceling out of the public domain, and laws affecting the public order and the substitution of the Spanish language for the French in legal proceedings. It is quite apparent that the Spanish laws were acceptable to the inhabitants, for no attempt was made to change them after the cession, further than was operated by subjecting the country to the authority and Constitution of the United States. So that at this time, Louisiana is the only State of the vast territories acquired from France, Spain and Mexico, in which the civil law has been retained, and forms a large portion of the jurisprudence of the State.

The Treaty of Paris guaranteed to all the inhabitants of Louisiana, then embracing the immense territory from the Gulf to the forty-ninth parallel of latitude, and from the Mississippi River to the Rocky Mountains, all the rights, advantages and immunities of citizens of the United States, and protected them in the enjoyment of their liberty, property and religion. As in matters of treaties, the President and Senate of the United States possess the supreme power, no steps were needed to naturalize the inhabitants of the territory, how short soever the residence in it had been at the time of the cession. They became at once citizens of the United States.

The first government provided for the ceded territory by our Government was exceedingly simple. Congress, in advance of the transfer on the 31st October, 1803, provided that until the expiration of that session of Congress (unless provision for the temporary government should be sooner made) all the *military, civil* and *judicial* powers exercised by the officers of the existing government of the same, should be vested in such person or persons, and should be exercised in such manner as the President of the United States should direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion.

It was not long, however, before the principal part of the present State of Louisiana was organized into a territorial government under the name of the Territory of Orleans. We say principal part, because although the terms of the law embraced within the territorial limits that part of the State between the Mississippi River and Pearl River, and between the Mississippi Territory and the Manchac or River Iberville, this part of the territory was at that time actually held by Spain, and continued to be so held until 1810. The legislative power of the territory of Orleans, by the Act of Congress of March 22, 1804, was vested in the Governor, appointed by the President, and in thirteen of the most fit and discreet persons of the territory, who were to be appointed annually by the President. The ancient laws were continued in force until repealed or modified by the Legislature. In March, 1805, Congress reorganized the territorial government by authorizing the President to establish a government similar to that exercised in Mississippi Territory, which had been created by adopting the same government as that organized under the celebrated ordinance of 1787, for the government of the territory of the United States, northwest of the river Ohio, excluding the last article of the ordinance which prohibited slavery. Therefore, to know what law governed the territory, recourse was had to the ordinance of 1787.

As was to be expected, the first changes made in the laws of Louisiana were in relation to crimes and offenses, which could, in a country having no immemorial usages, exist only by virtue of statute law, and which were introduced in language and terms known to the laws of England; and in the Act of the 4th of May, 1805, the following provision was adopted, viz: "All the crimes, offenses and misdemeanors hereinbefore named, shall be taken, intended and construed according to and in conformity with the common law of England, and the forms of indictment (divested, however, of unnecessary prolixity), the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of said crimes, offenses and misdemeanors, changing what ought to be changed, shall be (except by this Act otherwise provided for) according to said common law."

The crimes and offenses referred to in the section comprised

the principal offenses known to our law, so that at the present time the section of the statute of 1805 is deemed to be applicable to all crimes and offenses. Standing as it has done on the statute book from 1805 to the present time, without modification or change, in the midst of the various schemes for the revision of our statute laws, it has had a marked influence upon the criminal jurisprudence of Louisiana. It has given stability to that jurisprudence, since the inquiry of our judges was limited to the common law as it stood at the time of the passage of the Act. They were not bound to follow the common law of England, as it became modified by adapting itself to the changes introduced by statutory law of England, but they were to look to a single standard, viz., the common law of 1805. This venerable provision was re-enacted for the first time in 1870, but, at the same time, in the last section of the revised statute it is excepted from repeal. The common law of England, ever pliant, and bending itself to the gradual changes wrought by the improvements in science, the arts, manufactures and commerce, and by the modified habits of the people, has never been precisely the same from age to age. Hence the modern English authorities, whenever overruling the standard works on the criminal law of the period of 1805, have not been regarded as of binding authority.

The next important measure affecting the civil laws was the codification of the civil laws of the territory. A great misapprehension exists in the minds of many in regard to the Civil Code of Louisiana. It is supposed to be but a re-enactment of the Napoleon code. It is true the French code preceded our code of 1808 by five years, and a *projet* of it (for the Napoleon code, as adopted, had not reached the territory), may have suggested to our legislators the necessity of reducing the laws, which were in the Spanish language, a tongue foreign to the largest portion of the citizens of Louisiana—Americans, or those who were of French descent—into a single code, which should be published in French and English.

In June, 1806, the Legislature, by a resolution, appointed two prominent lawyers, James Brown and Moreau Lislet, to compile and prepare a civil code, and they were expressly instructed by the Legislature "to make the civil law by which

this territory" was then "governed the groundwork of said code;" in other words, to make the Spanish law the groundwork of the code. On the 31st of March, 1808, the old code was adopted, declaring merely an abrogation of the ancient laws wherever the same were contrary to that code, or irreconcilable with it. The effect of this provision was to leave all the Spanish laws not irreconcilable with the code in force, and they continued to be quoted and acted on in the courts until 1828, when by one sweeping clause in the statute of 25th of March, known to lawyers as the great repealing act, all the civil laws which were in force before the promulgation of the civil code then lately promulgated were repealed.

If it was the intention of the Legislature to prevent reference to foreign systems of law, principles, maxims, and for rules for the exposition and interpretation of our own, and to confine our courts to the meagre provisions of the civil code and of statutory law for all rules for right and justice, it was a mistaken labor. The Legislature might as well attempt to repeal and abrogate the language of its people and the rules of logic, as to prevent the lawyer from recurring to the ancient principles and maxims of the law as well as its history, in order to ascertain its meaning. The enactment of a law, whether organic, as in the case of constitutions, or legislative, presupposes the existence of rules of interpretation. And so it has happened that the ancient laws are still examined, not as only reflecting light upon those remaining, but as also furnishing the great storehouse of equitable maxims for the decision of cases not foreseen by the law-givers. The ancient laws and maxims teach us what is equitable and just.

By resolution of the Legislature, passed the 14th of March, 1822, Messrs. Livingston, Derbigny, and Moreau Lislet were appointed, on joint ballot, to revise the civil code of 1808, by amending it in such a manner as they should deem advisable, and by adding thereto such laws as were still in force and not included therein. These jurists, among whom the last named was not the least, reported their proposed amendments of the code to the Legislature, and the articles of the old code and the amendments were numbered continuously, and on the 12th of April, 1824, they were approved by the Legislature, and

went into operation in 1825—in the city of New Orleans, the 20th day of May, 1825, the day of its promulgation.

There are very many articles in the civil code of 1808, and as amended in 1825 and continued by the recent revision of 1870, which are identical with articles in the Napoleon code, and lead to the supposition that whenever the compilers of the code of 1808 found an article in the *projet* of the French code, which they had, which fully expressed the sense and meaning of a provision of the law of Louisiana, it was appropriated. In other instances, the French text was amended to conform to our law, and so adopted. In others, the Spanish law was first written in French and translated into English. Nevertheless, the laws of Louisiana, where differing from the Napoleon code, have been preserved, and thus the civil code contains some provisions in sharp contrast with the Napoleon code.

When the code of 1808 was enacted, laws were passed in French and English. The government being territorial, there was no constitutional provision requiring the laws to be passed in the English language. Hence the French text of the articles found in the code of 1808, and still retained, have been held to be of equal force with the English articles, and have been resorted to by the courts to prevent the evils which might flow from a bad translation.

Although Spanish law has been the law of the land, and our courts take judicial knowledge of the same without proof, and although the French laws are esteemed foreign laws which require to be proven when brought in controversy in our courts, yet the similarity of the French text of our late codes to the Napoleon code has been so great that commentators on the French code, as well as the decisions of the court of cassation, have exercised great influence on controversies arising under our own code. Perhaps one reason has been that we have no commentaries of our own further than some annotated codes, and a work on criminal law and digests of the decisions of the courts, owing to the limited sale which has followed all similar publications. Hence French authors are an essential part of a lawyer's library.

The practice of the State Courts of Louisiana up to September, 1825, when the code of practice prepared under the reso-

lution of 1822, approved April, 1824, went into effect, was regulated by the Act of 1805 (which was based on the Spanish laws) and amendments thereto. The Code of Practice itself was written by its compilers in the French language, and many of its articles are badly translated. It was (1870) revised by incorporating some amendments (which have, from time to time, been enacted) into the body of the work. It has not been materially changed in other respects, and the numbers of the articles remain the same.

We notice some efforts now being made to introduce further amendments in order to lessen the present heavy costs of litigation which drive suitors from the courts of justice. Some change is certainly very desirable, not so much to amend as enforce the law respecting costs. When we consider how extensive the litigation is which arises from the adoption by the Legislature of a new system of practice, it should admonish us to modify with some caution. It took twenty years to settle the practice act of 1805, and since 1825 our courts have had much of their time occupied in ascertaining the meaning of the Code of Practice. The experiments in our sister States in adopting codes of procedure have also given rise to a great deal of litigation. Hence it would seem that if any change was to be introduced, it could best be done by way of amendments to the present system. It may also be observed that the new codes of procedure are rather imitations of our Code of Practice than otherwise. The preparation of the pleadings by the attorneys in New York is, we think, but a continuation of the ancient practice in that State of making up the rolls by the attorneys. The attempts of the Legislature of Louisiana to codify the other branches of the law failed.

A *projet* of a commercial code was prepared under the resolution of 1822, but fortunately never was adopted. It would be extremely unsatisfactory for a single State of the Union to adopt a system of commercial law which should sometimes come in conflict with the commercial law of the neighboring States as settled by their courts, and in conflict with the laws as settled by the courts of the Nation. As it is, the courts being free to act, have gracefully yielded on questions of commercial law to the customs of merchants and the rules settled

under the common law and in our sister States, so that the whole body of the commercial law governing this Union is, in the main, moulded into a harmonious whole. As it had been formed upon the custom of merchants, engrafted upon the common law, the decisions in England were generally looked to with great respect, and what is commercial law in London is commercial law in Washington, as well as among most commercial nations.

A like attempt was made to reduce the criminal law and criminal proceedings to a simple code in 1820. In 1821 Edward Livingston was elected by ballot of the General Assembly to draft a criminal code. Livingston prepared and presented to the Legislature a system comprising "a code of crimes and punishments." "A code of procedure, a code of evidence, a code of reform and prison discipline, and a book of definitions." This constituted the celebrated Livingston code, a work more famed abroad than at home—a work noted for its scientific description of crimes and offenses, and of the proceedings devised for the trial, prison discipline and punishment of offenders and their reformation. The *projet* never having become a law, has left the world unenlightened as to what would have been its practical operation. Being based upon the common law, which Livingston sought to simplify, much of it would doubtless have worked well, but, like all unbending legislative provisions regulating the details of practice, it would have taken years of discussion before the courts to settle its meaning. As it was, scarcely a question could be raised under the criminal law which had not been previously decided by some binding decision.

The Legislature of 1855 attempted to revise the statutes of the State, and adopted the hazardous experiment of annexing to each statute a clause not only repealing all laws contrary to the provisions of each act revised, but all laws on the same subject-matter, except what was contained in the civil code and code of practice. There being no saving clause except as to the act relating to crimes and offenses, an adherence to the language of the statutes would have occasioned the overthrow of offices and the loss of rights. It forced the courts to depart from the letter of the law in order to ascertain its meaning

and prevent an evil which the law-givers had not foreseen.

In the recent revised statutes the Legislature has repeated the same experiment without even a saving clause as to the crimes and offenses, and again forced the courts to interpret so as to prevent great evils. The revised statutes of 1870 are comprised in 3990 sections, and contain the matters of the revised statutes of 1856, and the recent amendments.

Having thus hastily glanced at some of the prominent points in our legislation, we will look for a moment into the courts in session in our midst, and take a practical view of the laws enforced in them. We shall find that, among others, the courts of the United States have jurisdiction of cases—

1st. In admiralty.

2d. In bankruptcy, patents and copyrights.

3d. In revenue and prize cases, offenses against the United States and other causes in which the Government of the United States is interested as plaintiff.

4th. Of causes affecting ambassadors and other public ministers and consuls, and controversies between two or more States.

5th. Concurrent jurisdiction with the State courts of all cases, where the matter in dispute exceeds \$2000, in which a citizen of another State is plaintiff or defendant and the other party is a citizen of the State, or in which an alien is a party.

6th. Concurrent jurisdiction with the State courts, where the matter in dispute exceeds \$2000, and arises under the laws and Constitution of the United States or treaties made under their authority.

We shall find that the State courts have exclusive jurisdiction of crimes and offenses against the State, of probate matters, of all controversies between citizens of the State, whether it respects their property or *status*, or obligations arising from wrongs done to them by others. And they have concurrent jurisdiction with the courts of the United States on all these questions when an alien or citizen of another State submits himself to the jurisdiction of the State courts, or when sued does not avail himself of his right which he has to remove his cause to the courts of the United States.

If we now regard the mode of proceeding in the different

courts we shall find it very dissimilar, and, in a few particulars, resting upon principles directly the opposite of each other ; for example : if your ship has been damaged by collision on navigable waters, and the party who was instrumental in occasioning the damage, is within the reach of process of the court, you have your choice, to proceed against such party on the law side of the State or Federal courts, according to the citizenship of the party, or to bring your action in admiralty, *in rem* or against the person. If you sue on the law side of the courts, you must take care that neither you nor your agents controlling the ship have been in fault. For the courts of law, deriving their rules from a rigid morality, inform you that they do not sit to balance negligences, faults and wrongs ; that whoever comes before them must come with pure hands. Their maxim is, *procul, O procul este profani*, and the suitor who has been partly in the wrong, is sent away without redress, however much he may have been damaged, and how much greater soever may be the fault of the other party.

The courts of admiralty, looking at human actions in a more benevolent light and with a juster appreciation of the conduct of men in times of danger and excitement, consider the faults and negligence of both parties, and where both are in fault, estimate the loss of both vessels and divide the loss between the parties, and grant relief where, in a court of law, it would be refused.

The proceedings in admiralty are of civil law origin, and many of the principles governing the court are of very great antiquity. They can be traced back to the Greeks before the Christian era, whence they were received into the Roman jurisprudence.

The jurisdiction of the courts of admiralty is exclusive, whenever the proceeding is *in rem* ; that is, against the vessel or other thing not the subject of maritime jurisdiction. If, however, at the same time persons can be found and service made upon them by arrest, which is still allowed as citation, and the matter to be brought to the consideration of the court is one for which the common law gave a remedy, the courts of ordinary jurisdiction have concurrent jurisdiction *in personam*, and may decree compensation and damages as in other cases. But if the

ship or vessel is the object of pursuit, and the same is to be taken into the custody of the law and made responsible for liens and privileges in ordinary cases, civil and maritime, including spoliation, civil and maritime, or prize cases, the District Courts of the United States alone have jurisdiction, and any judgment pronounced in a proceeding *in rem* in the highest court in the State where the same can be rendered, if that court be but a justice of the peace, in an unappealable case, can be carried before the Supreme Court at Washington, where it is sure to be reversed—that Court zealously protecting the jurisdiction of the Federal courts over such cases.

In admiralty, personal qualities are in effect attributed to matter, so that it is the ship, vessel, or other thing which is supposed to have offended in prize cases, and in ordinary civil cases it is the ship or vessel which owes the duty or lien, as well as the captain and owners, and all persons interested are admitted in the process *in rem* as claimants, and the thing is treated as a real defendant. Revenue cases are in some respects assimilated to the above, although not belonging to the admiralty jurisdiction.

The proceedings are commenced by a libel (*libellus*, a little book), in which the plaintiff, through his lawyer, called a *proctor*, alleges, and articulately *propounds*, in a series of numbered propositions, the grounds of his complaint, to be specifically answered by the defendant, or by whoever comes into the case as claimant, if the proceedings be *in rem*. If either party give a bond for property, etc., he borrows a term from this, a solemn form of the civil law, and calls it a stipulation.

The Constitution of the United States conferred upon the courts of the Union exclusive jurisdiction in admiralty. In England this jurisdiction extended to tide waters only. At the commencement of the Government, giving the language the signification it then bore, it was supposed the power conferred only extended to tide waters, and so it was decided by the Supreme Court of the United States. The jurisdiction in the case of *Warring et al. v. Clarke*, 5 How. (46 U. S.) 44, decided in 1847, for a collision between the steamboats Luda and De Soto, was maintained by proving that there was a per-

ceptible tide extending up the Mississippi River as high as Bayou Sara.

Since that period the Supreme Court of the United States, notwithstanding the earnest dissent of some of its members, has, as it always happens when convenience and expediency demand a change, extended the admiralty jurisdiction over the lakes and all rivers navigable by vessels of ten tons burthen and upwards. [*The Genessee Chief v. Fitzhugh* (1851), 12 How. (53 U. S.) 443; *The Ad. Hine v. Trevor* (1866), 4 Wall. (71 U. S.) 555; *Ex parte Boyer* (1883), 109 U. S. 629; *Butler v. Boston & S. Steamship Co.* (1888), 130 Id. 527.] The simple and speedy proceedings in the courts of admiralty make that court a great favorite with many, while others think they see the tendency in the national courts to engross jurisdiction, which may lead to greater evils in the end than the present good attained by decisions, which they think overstep the limits of the Constitution as understood by those who framed it.

The Constitution of the United States also confers upon Congress power to pass uniform rules of bankruptcy. It is a principle governing many of the provisions of the Constitution of the United States, that they are inoperative until Congress has passed some law to carry the provisions of the Constitution into effect. Thus the Constitution gives the courts of the United States the right to take jurisdiction of controversies between citizens of different States, between aliens and citizens, and as it respects the grants of lands made by different States, etc. But the courts of the United States hold that they cannot take cognizance of such controversies without an act of Congress to carry the provisions of the Constitution into effect. Hence the individual States have power to pass and enforce insolvent and bankrupt laws when no act of Congress is in force on the subject. Since the formation of the Federal Government, bankrupt laws have been passed between long intervals and following commercial disasters, on three occasions, viz., April 4, 1800, repealed in 1803; and 19th of August, 1841, repealed 3d of March, 1843, and that of 1867, which expired on the 1st of September, 1878.

The insolvent laws of Louisiana, thus dormant by reason of the act of Congress, are of Roman origin. Under the law in

the period of the twelve tables, the borrower of money or debtor could deliver himself, his family and effects into the hands of his creditor, and became bound to him *nexu vinctus*. He was only released on payment of the debt by himself or by another for him. If he failed to pay, he was adjudged to the creditor with all his property. In other cases, after certain publications and delays, the debtor was adjudged (*addictus*) to the creditors, who could slay him, or sell him as a slave beyond the Tiber. If there were several creditors, the twelve tables ordained that he should be cut in pieces *and fairly divided* among the creditors—which probably meant a division of the price of the debtor, after he and his goods were sold. As the *pater familias* had the power of life and death over his children and grandchildren, of whatever age they might be, as well as over his slaves, this provision of the twelve tables does not seem so extraordinary.

After the preceding provision was abolished, there was a period of the Roman law, in which the debtor's goods were sold in mass (*per universitatem*), and the vendee succeeded *actively* and *passively* to the effects and debts of the insolvent, and was bound to pay the price to the creditors *pro rata*. Hence, as the debtor had an universal successor, he was discharged from the debt. The benefit of the cession of goods (the insolvent law), as it now exists in our law, had its origin in the time of Julius or Augustus Cæsar. Where the cession was made under the law Julia (*ex lege Julia*), the debtor enjoyed the right to the *beneficium competentiæ*, which is a point of difference between the bankrupt laws and our own, the *cessio bonorum*.

A man may commit an act of bankruptcy and be forced into court without being insolvent. Under the State law, he cannot be forced into insolvency so long as he has effects to meet executions. The bankrupt laws discharge the debtor absolutely from the debt. The *cessio bonorum* does not relieve the debtor absolutely from his obligations, but if he comes to a fortune subsequently to his surrender, he can be compelled to make a second surrender, but he is entitled to retain for his own use a competency—that is, the *beneficium competentiæ* just mentioned. The insolvent laws of Louisiana, in common with the bankrupt laws of the individual States, do not discharge the debtor from his obligation due the citizens of the other States, and

only barred the obligation due citizens of the same State.

Where contracts are entered into during the existence of a bankrupt law, there can be no question of the right of the courts (considered as a question of morals), to discharge the debtor. The right is a condition making a part of the contract. The debtor could say to his creditor: "When I bound myself to pay you a sum of money, it was with the understanding that if, by misfortune, I should become embarrassed, that I should be discharged from the debt by surrendering to you and my other creditors all of my effects. You took my obligations, knowing that the law, which was a part of the contract, gave me this right, and you are bound by the contract." But where the bankrupt law is passed after the debt was contracted, the right to discharge the debtor is not quite so apparent, since it is a fundamental principle of our law that the States cannot impair the obligation of contracts.

The propriety of enacting bankrupt laws by the sovereign power, depends upon the weighing of the propositions whether it is better that some persons should suffer inconvenience on account of the incautious use of credit, as an example to deter others and prevent the like occurrences, and the advantage which the State will derive from the free and untrammelled industry of all its citizens, particularly where many are embarrassed, coupled with the drawback that the bankrupt laws are frequently made the means of screening the money and effects of a fraudulent debtor from the pursuit of his creditors.

The insolvent, oppressed with debt, is incapable of engaging in new business and occupation. Freed from the overwhelming burden, he engages again in useful employments with spirit and zeal, and becomes a wealth producer and a valuable citizen to the State.

In 1824 Congress passed a law adopting for the practice of the Federal courts in this State, the rules of proceeding of the State courts. At this time, as already shown, the *code of practice* was not adopted. But the rules of proceeding under the practice acts were very similar to those prescribed by the Code of Practice. A large number of the bar were of the opinion that the broad terms of the Act of Congress of 1824 introduced into the Federal courts the State practice in all cases, and to the

exclusion of proceedings on the equity side of the court, according to the forms common in the other States. After a strenuous contest it was finally settled that the courts of the United States had equity jurisdiction according to the ancient forms, and all causes proper for the consideration of the chancellor are required to be brought on the equity side of the court—that is, they must be brought according to the rules of the practice in chancery—and these rules are uniform throughout the United States, while the law side of the Federal courts is governed by the laws of the individual States to the same extent as the State courts in ordinary affairs.

There are great misapprehensions as to the meaning of the term equity, or chancery. It will surprise some to be told that proceedings in equity are governed by laws as well known and as faithfully carried out as those upon the statute book, and after all, that is nothing more than a mode of rendering justice and granting relief in a different manner, concurrently with, or in a different class of, cases from those relievable at law.

In every system of laws there must arise a state of facts with which courts of justice are required to deal, not contemplated by the law-giver, nor provided for by him, or if within the express letter of some broad provision which he has laid down, yet of such a character that, to carry the provision into effect, would shock that innate sense of justice implanted in the bosom of everyone, and such considerations would leave no doubt that the law-giver never intended the provision in question to govern the particular case. In the first example, the courts find rules of decisions from the equitable maxims which are supposed to be the foundation of all laws; in the other, the courts interpret according to the rules of equity and the general intent or scope of other laws on like subjects, and endeavor to arrive at the true spirit and meaning of the law, and exclude from the broad words of the law what was not the intention of the law-giver to embrace in them. For, as St. Paul has it—

"The letter killeth, but the spirit giveth life."

If, from some forgotten statute, or from time immemorial, the practice of the courts of law has been confined to a set of formulas, that is a condition of things not contem-

plated in former ages, and a class of wrongs which these formulas are insufficient to redress. Precisely this condition of affairs did arise under the *jure civile* in the Roman law, which was remedied by the jurisdiction which the praetor assumed or amplified when he established the *jus honorarium*, and allowed petitions to be addressed directly to him in extraordinary cases, and in England, where the chancellor assumed jurisdiction of those cases in which there was no adequate redress at law. In the latter country (as in the former, in ancient time), proceedings on the law side of the courts were regulated according to certain strict forms, and relief could not be afforded in any other manner. In the action of assumpsit, for example, a judgment could only be rendered for damages; in debt, that the defendant recover his debt and damages; in covenant, even to convey land, the judgment is that plaintiff recover his damages, and so of the other actions. It was found in very many cases that the relief granted by the courts at law was wholly inadequate to the injury. The Chancellor of England gradually assumed jurisdiction over this class of cases, and, uncontrolled by formulas, rendered his decree according to the right of the case. If the defendant had contracted to sell to the plaintiff a tract of land, while a court of law could only in the action of assumpsit or covenant give judgment for damages, the Chancellor, meeting the very equity of the case, ordered the defendant to make title and to account for the revenues, and compelled obedience to his decrees by proceedings known to his court.

The kind of jurisdiction assumed by courts of equity may be illustrated by an example from the statute of frauds and perjuries passed in England in 1677, and adopted, in some form or other, in most of our sister States. By this act, among other things, it was provided that no action should be brought upon any contract for the sale of lands, unless the agreement, or some memorandum or note thereof, should be in writing and signed by the party to be charged therewith.

Now it sometimes happens that verbal contracts are made and partly performed, as for example, the intended purchaser, who paid part of the price and has been put in possession. By the strict letter of the statute, the vendee would be defeated in

his action upon the verbal contract. But a court of equity, viewing the statute as made for the purpose of preventing fraud, comes to the relief of the purchaser, on the ground that, to allow the vendor to avail himself of his advantage, would be to encourage one of the mischiefs which the Legislature intended to prevent. It compels him to answer plaintiff's complaint under oath, and decrees a specific performance. Under our State law, where equity and law are administered together, the like relief is only granted where the defendant admits the contract under oath, and possession has been delivered the vendee.

Equity, among other things, grants relief in the following cases, viz: Suits for the specific performance of contracts for the sale of real estate; to foreclose or redeem mortgages; to stay waste of lands; to enforce trusts; to relieve against fraud, and enjoin parties against enforcing judgments of courts at law where obtained by fraud; to compel a party to answer under oath, in order that the replies of the defendant, or the documents, where any are disclosed as existing, may be used as evidence in suits at law; to settle long and intricate accounts; to marshal securities; to settle boundaries; to correct mistakes in contracts to relieve, in some cases, against penalties and forfeitures, and to protect the rights of married women, minors, etc. It is thus seen, from the examples given, that equity embraces a very considerable portion of jurisprudence, and as it is governed by principles of its own, it is easy to see that in many instances it may come in conflict with the State laws. For if citizenship gives the United States courts jurisdiction, and the case be one of exclusive equity jurisdiction, and should be brought in the United States courts, it will not be heard, except on the equity side and according to the rules in equity, no matter what is the State practice in the same case.

The practice on the law side of the courts of the United States, sitting in Louisiana in civil cases, is governed by the practice of the State, which practice was adopted in 1824 by the act of Congress for the Federal courts, as stated above [and now by sec. 914, of the Revised Statutes of the United States, the practice of the law courts of the several States is

adopted for the United States courts sitting in such States].

Criminal proceedings, both in the courts of the United States and the State courts, are conducted as already shown, according to the forms of the common law.

The courts of Louisiana also take judicial cognizance of the common law as it exists in the other States of the United States, but statutes of the other States are to be proved. Published statutes and digests are received in evidence, as well as exemplifications under the great seal: La. Rev. Stat. 1869, sec. 2171; *Copley v. Sanford, Exr.* (1847), 2 La. Ann. 336.

Without adverting to their more remote origin, the following branches of law come to us with the forms with which they have been clothed, and the principles with which they are allied from English sources, viz:

1st. Admiralty and matters of maritime jurisdiction; the law and practice of courts of admiralty; equity and the rules and practice of courts of chancery.

2d. Bankruptcy.

3d. Criminal law and criminal proceedings, including warrants for arrest, indictments, informations, etc., although unlike the original States of this Union, we have no common law offenses, and all crimes and misdemeanors are created by statutes.

4th. Evidence, criminal and civil.

5th. Commercial law, which in addition to maritime contracts just mentioned, among others, embraces promissory notes, bills of exchange, bank paper, checks, etc.

6th. The great writ of habeas corpus; and,

7th. Martial law, of which this city, since O'Reilly's entry in 1769, has had large experience, both Spanish and American.

The law relative to the *status* of persons, domicile, minority, emancipation including the *venia ætatis*, corporations (*universitates*), donations, testaments, dotal rights and property, the contract of sale, exchange, letting and hiring including leases, loan to use, loan for consumption, partnership, mandate, suretyship, annuities and rents, the aleatory contracts, pawns and pledges, antichresis, privileges, mortgages, usucaption, prescription, the discharge of debts by novation, compensation, payment

with subrogation, release, or acceptance, and the effect of notarial acts, are from the civil law.

The *venia ætatis*, in its origin, was granted by the prince, and gave the minor the rights of an adult. By the Louisiana law, it is granted to a minor having capacity, and over eighteen years of age, by the courts, and enables him to exercise full control over his estate.

The law respecting the community of acquets and gains is no doubt of German origin. It prevailed in certain provinces of Spain, as for example in Grenada and Salamanca, while other provinces, like the South of France, were governed by the dotal regime, called written law. The community of acquets and gains prevailed in the colony under the custom of Paris, from its first settlement, and it is stated by our excellent historian, Mr. Gayarré, that it was a subject of complaint to the colonist at one time, that it was extended to the cases where colonists had married, with the forms of the Catholic church, Indian wives who, having less stable habits than the whites, frequently absconded after the death of their husbands, with the personal effects, without paying the debts of the estate or settling up the same in due form. (The evil was corrected.)

One of the most marked peculiarities of the laws of Louisiana, as compared with the laws of the other States, is this institution of the community of acquets and gains. It is more favorable to married women than any other system with which we are acquainted, except the Spanish laws of the *Indeas*, from which it was, we think, immediately taken. By the custom of Paris, and the Napoléon code, the personal effects of the wife, in the absence of a marriage contract, fall into the community. Under our law, in the same case, the personal effects remain the property of the wife, that is, they remain paraphernal.

The advantages of the institution are decidedly in favor of the wife. The husband can not withdraw from the partnership, and he, the community, and his separate estates, are alike bound for the debts of the community as it respects third persons. The wife, on the other hand, can at its dissolution by death or divorce, withdraw from it without detriment to her separate estate, and where the affairs of the husband are embarrassed, she can be declared separate in property from her husband by

the courts, and take into her own hands the administration of her affairs, and sell under execution, the community, or his estates, to reimburse herself for any property or money used by him in his business; and as the law gives her a mortgage for her security, she is always a formidable adversary to a creditor seeking to recover a debt, even of the community. The income of the husband (married without a marriage contract) from his own labor, and from his separate property, falls into the community, without any ability on his part to prevent it. On the other hand, the wife has, at all times, the absolute right to withdraw from her husband (by contributing one-half of the matrimonial expenses) her separate or paraphernal property, and to manage it herself, and reinvest the income thereof in her own name, and for her own use, and we know no law to prevent her also from sharing in the community at its dissolution.

The husband, it is true, is the head and master of the community during the existence of the marriage, and can dispose of the effects of the same at his pleasure and without his wife's sanction by onerous title, that is, for an equivalent; but if he conveys the same by gratuitous title, that is, by gift or donation, his estate becomes responsible to the wife for the loss.

If prior to, or at the marriage, the parties choose, they can settle property in what we call dower—the *dos* of the civil law. Property so settled cannot be sold by either husband or wife, or both (except in one or two cases), during the marriage and thus the wife is assured of her estate at the termination of the marriage.

The provision prohibiting married women from binding themselves with or for their husbands is Spanish, and from the 61st law of Toro. The *senatus consultum Velleianum* had previously prohibited women from going surety for anyone—*ne pro ullo fœminæ intercederent*.

The marital fourth (that is, the one-fourth of the estate of the predeceased husband or wife who had died rich, the survivor being in necessitous circumstances) was given by the fifty-third and one hundred and seventeenth novels of Justinian, *in honorem præteriti matrimonii et conseruenter conjuges in Solito statu*.

The action of redhibition (on account of secret defects in things sold) was given by the edict of the *ædiles*. The order of seizure and sale, to coin a word, that Rhadamanthine provision of our law where execution comes first and judgment afterward, is from the Spanish law.

The various pacts which supplied the defects of the strict *leges civiles* are of pretorian origin.

We have thus briefly, and therefore imperfectly, glanced at some of the most striking features of our laws.

These laws, such as they are, and with their slight imperfections, are justly dear to the people of Louisiana. They have protected and shielded the home and the fireside, the labors, the bargains, and the acquisitions, the estates, and the persons of this people during all the growth of the State of Louisiana. The immigrant who has come here from the sterile hills of New England, from the more genial climes of the South, from the fertile fields of the West, as well as our ancient French, Spanish and German populations, has approved and blessed these laws. To those who would like to see the body of the common law introduced among us we say, what have you of value in the common law? The trial by jury, the *habeas corpus*, known and defined crimes and offenses, and enlightened rules of evidence? We have it all here, and more. Your criminal law is ours; your commercial law also is ours. But we have also the most admirable provisions of the civil law filled with benevolence, equity and justice, to regulate our dealings and define our rights in our every-day life. That our laws, like all others, may require amendments to make them more perfect, none will deny. Let us amend, but never change them for others, of which our people have no experience, and the adoption of which promises us no advantages in the future.

HON. E. T. MERRICK.

New Orleans, La.

*Supreme Court of Minnesota.*CHARLES D. DEAN, *Appellant*,

v.

ST. PAUL UNION DEPOT CO., *Respondent*.

Where a depot company contracts to furnish terminal facilities for the passenger business of a railroad, it is bound to use ordinary care and diligence to keep its premises in a safe condition for passengers; and this obligation renders it liable for knowingly employing, or allowing to be employed in the depot building, a man of vicious temper, of bad character, and who frequently assaults passengers in a wilful and vicious manner.

Appeal from District Court of Ramsay County.

Davis, Kellogg and Severance, for appellant.

John O'Brien, I. V. D. Heard, and Cole, Bramhall and Morris, for respondent.

COLLINS, J., August 5, 1889. The plaintiff appeals from an order sustaining defendant's demurrer to the complaint, on the ground that it failed to state facts sufficient to constitute a cause of action. From said complaint, and a stipulation as to certain facts, made by the parties, and by agreement considered as if the facts therein stated had been a part of the pleadings demurred to, it appears that the defendant is a domestic corporation, organized for and engaged in the business of furnishing and conducting an Union Depot and station-house in the city of St. Paul, in which several lines of railway deliver and receive passengers, by virtue of their contracts with defendant; that on May 17th, 1888, plaintiff reached said depot as a passenger upon one of the said roads, and with the intention of pursuing his journey to a point beyond, by another road, entered the station-house, approached the parcel-room therein, leased by defendant to a tenant who operated and controlled it, for the purpose of checking his valise and was there maliciously attacked and beaten by the man in charge, who was in fact the employe of defendant's tenant. The complaint further alleges that this employe was of vicious temper, of bad character, and had frequently, in a wilful and malicious manner, assaulted and beaten people lawfully upon the premises, during the six years he had been employed in said parcel-room, all of which was

known to the defendant on the day of the attack upon plaintiff.

In support of its demurrer, the defendant corporation contends, first, that it owed no duty whatever to the plaintiff, because no contractual relation existed between the parties; that therefore he must look to the railway company, whose passenger he was or had been, for compensation for his injuries; second, if it should be held that the duties imposed by railway companies towards their arriving and departing passengers have been assumed by the defendant, it is not responsible in this case, because the alleged assault was not committed by one of its servants or employes, but by the employe of a tenant who was engaged in an independent business, wholly disconnected from that of a common carrier of passengers, and conducted solely for the accommodation and convenience of those who choose to patronize the room and pay for the privilege of having their parcels temporarily taken care of. Finally, if these positions prove untenable, it is argued that the assault of the employe was for purposes of his own, outside of his occupation, in disregard of the object for which he was employed, not committed in execution of it, and therefore, in no event, can the defendant be held responsible. It has been announced by this Court, in *Ahlbeck v. St. P. M. & M. Ry. Co.* [decided in the Supreme Court of Minnesota, November 20, 1888] that in respect to the handling and care of baggage, the relation between the defendant corporation and the carriers who use its depot, is that of principal and agent. But under the allegations of the complaint now before us, it is not essential to determine the precise relations existing between the defendant (organized for the special purpose and under contract to furnish to certain railway corporations proper and adequate depot and station-house accommodations for those who are entitled to use the same) and the plaintiff, who, arriving upon the train of one of these carriers, remained its passenger until he had an opportunity, by safe and convenient means, to leave the cars, the railway and the station-house: *Warren v. Fitchburg Ry. Co.* (1864), 8 Allen (Mass.) 227.

Nor is it necessary to pass upon the contention of the defendant, that whatever duty it owed the plaintiff as a passenger, it cannot be held liable for the wilful act of the servant and em-

ploye of one who had leased a room in its depot building for the purpose of carrying on an independent business, not required of the carriers of passengers and conducted by a tenant, solely for the convenience of the traveling public. Nor, as we regard the pleadings, need we regard the final position assumed by defendant, that the master is not responsible for the wilful acts of his servant, performed outside of his employment, not in execution of it, and for purposes of his own, although the subject has been referred to in *McCord v. Western U. T. Co.* [decided by the Supreme Court of Minnesota, September 4, 1888], in which is mentioned approvingly, the case of *Stewart v. Ry. Co.* (1882), 90 N. Y. 588, whereby *Isaacs v. Third Avenue Co.* (1871), 47 N. Y. 122—relied upon by the respondent—was, in effect, overruled.

This complaint, considered in connection with the stipulation, charges that the defendant knowingly and advisedly permitted its tenant to keep in his employ, for more than six years, in its depot building, into which it encouraged people to come, and was under contract to admit the plaintiff as an arriving passenger, a man of savage and vicious propensities and who had, during said period of six years, frequently assaulted and beaten persons lawfully upon said premises, and who, upon the day named, attacked and beat the plaintiff without provocation. Whatever obligation otherwise, by virtue of its contract with the carrier, rested upon the defendant as to the plaintiff, it is manifest that it was bound to use ordinary care and diligence to keep its premises in a safe condition for those who legitimately came there. It had no more right, therefore, to knowingly and advisedly employ, or allow to be employed, in its depot building, a dangerous and vicious man, than it would have to keep and harbor a dangerous and savage dog, or other animal, or to permit a pitfall, or trap, into which a passenger might step, as he was passing to or from his train.

Order reversed.

The doctrine announced in this case is wholesome and salutary, and it is regretted that the principle upon which it should rest, was not carefully considered and as emphatically announced.

It is contended by the writer that the principle for this doctrine is, that the proprietor, owner or controller of a place open to and for the public, is bound, as a matter of duty, to see that all persons

who come there on the business for which the place is open, are protected from assaults and insults, because, having the privilege of doing such a business and inviting the public to come there, he owes the duty to protect all who come there on that business. This principle was some years ago asserted by the Indiana Court in *Henry v. Dennis* (1883), 93 Ind. 452; and recently by the Supreme Court of Pennsylvania in *Rommel v. Schambacher* (1888), 120 Pa. 582; S. C., 27 AMER. LAW REG. 156. This is nothing more than the announcement of the general doctrine of duty to another invited to a place of business.

It is objected that, if this principle is carried to its legitimate conclusion, it will hold responsible proprietors of stores, and business houses, for assaults and insults committed by strangers who come there with the vicious purpose and intent to do wrong. Is there any reason why they should not be held responsible? If the proprietor had knowledge or notice of the vicious intent, or propensity, or, with reasonable care, could have had such notice, he should be held responsible for his neglect of duty, in not keeping such persons away. If he did not have such notice, and could not have had it by the exercise of reasonable watchfulness and care, there is then a reason for exemption from liability, but, as will hereafter appear, the reason for the principle above stated does not advance this distinction.

The Minnesota Court (*Ahlbeck v. Railroad Co.*, *supra*, p. 23; *McCord v. Western Union Telegraph Co.*, *supra*, p. 24), holds the defendant liable, because he did not keep his premises in safe condition, free from dangerous and vicious men, the same as he must keep it free from dangerous and vicious dogs or other animals, and free from pitfalls or traps.

There are three different doctrines announced in this supposed principle

given as the ground or reason for the ruling in this case: the *first* is the principle which governs the liability resulting from defective and dangerous premises; the *second* is the principle which controls liability for injuries from dangerous and vicious dogs or other animals; and the *third*, those applicable to human beings.

The principles which control the law applicable to the actions of man, are different from those regulating the liability for defective premises, or dangerous and other animals. The principles of the law of liability for defective premises are confined to the unsafe condition, arising from unsafe construction, repair or use, as for instance injuries from pit-falls, the law of which has remained substantially the same since the case of *Blyth v. Topham* (1603), Cro. Jac. 158; Roll Abr. 88; or injuries from spring guns and other instruments of destruction, first discussed in *Deane v. Clayton* (1817), 7 Taunt. 489; and developed in *Flott v. Wilks* (1820), 3 Barn. and Ald. 304; *Bird v. Holbrook* (1828), 4 Bing. 628; *Wootton v. Dawkins* (1857), 2 C. B. (N. S.) 413; *Townsend v. Wathen* (1808), 9 East 277; *Hooker v. Miller* (1873), 37 Iowa 613; *Johnson v. Patterson*, (1840), 14 Conn. 1: Or injuries from dangerous places, or dangerous instrumentalities, on private premises or private way, near the highway: *Largreaves v. Deacon* (1872), 25 Mich. 1; *Kohn v. Lovett* (1871), 44 Ga. 51; *Corby v. Hill* (1858), 4 C. B. (N. S.) 554; *Clark v. Chambers* (1878), 3 Q. B. Div. 327; or injuries from dangerous places in business houses and grounds, as defined in *Carleton v. Franconia Iron Co.* (1868), 99 Mass. 216; and *Indemaur v. Dame*: (1866), L. R. 1 C. P. 274; on Appeal (1867), 2 C. P. 311: or dangerous places in public houses, places of public resort, and exhibition: *Francis v. Cockrell* (1870), L. R. 5 Q.

B. 184; or school buildings: *Donovan v. Board of Education* (1878), 55 How. Pr. (N. Y.) 176; *Bassett v. Fish* (1877), 12 Hun. (N. Y.) 209.

The application of this principle to railroad depots, stations, platforms and approaches, means that these must be free from such defects, as far as reasonable care can make them; and is well expressed by GRAY, J., in *Carleton v. Franconia Iron Co.* (1868), 99 Mass. 216: "The owner, or occupant of premises is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land, or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of." So, *McDonald v. Chicago, etc., R. Co.* (1869), 26 Iowa 124; *Toledo, etc., R.R. Co. v. Grush* (1873), 67 Ill. 262; *Liscomb v. N. J., etc., Trans. Co.* (1872), 6 Lans. (N. Y.) 75; *Picard v. Smith* (1861), 10 C. B. (N. S.) 470; *Martin v. Great Northern R. Co.* (1855), 16 C. B. 179; *Clusman v. Long Island, etc., R. Co.* (1877), 9 Hun. (N. Y.) 618. The care demanded is reasonable care only: *Pittsburgh, etc., R. Co. v. Brigham* (1876), 29 Ohio St. 374; *Indiana, etc., R. Co. v. Hudleson* (1859), 13 Ind. 325; *Wiffire v. London, etc., R. Co.* (1869), L. R. 4 Q. B. 693; *Chicago, etc., R. Co. v. Wilson* (1872), 63 Ill. 167; *Cornman v. Eastern Counties R. Co.* (1859), 4 Hurl. & Nor. 781; *Cross v. L. S. & M. S. R. R. Co.* (1888), 27 AMER. LAW REG. 405.

The liability for injuries by vicious and dangerous dogs, or other animals, rests on different principles; see a lengthy annotation to *Worthen v. Love*, 27 AMER. LAW REG. 631. At common law, the owner of a dog was not liable for its vicious acts, unless he had

knowledge of the vicious propensities and failed to exercise the proper care in restraint, because a dog was considered tame and harmless, and hence to charge the owner or keeper, *scienter* must be alleged and proved: *Read v. Edwards* (1864), 17 C. B. (N. S.) 245; *Dearth v. Baker* (1867), 22 Wis. 73; *Slinger v. Henneman* (1875), 38 Id. 504; *Fairchild v. Bentley* (1858), 30 Barb. (N. Y.) 147. This is the rule as to all animals *domita naturae*, unless changed by State statute, but with respect to wild animals, the owner, or keeper, was held an *insurer* against all injuries, though the late cases seem to place the liability upon the degree of care used, holding the keeper, or owner, to that high degree of care which a knowledge of the vicious propensities seems to demand: *Cooley on Torts* 349. In both cases, the *scienter* must be alleged and proved, because, knowing the vicious and dangerous propensities, it is his duty to adopt such measures, and use such precaution and restraint as will prevent injury from such propensities: *Muy v. Burdett* (1846), 9 Q. B. 101; *Earl v. Van Alstine* (1850), 8 Barb. (N. Y.) 630; *Van Leuven v. Lyke* (1848), 1 N. Y. 515; *Loomis v. Terry* (1837), 17 Wend. (N. Y.) 496.

A careful and exhaustive research has failed to discover any authority, where this doctrine has been applied to human beings, because the purposes, causes, and reasons, for the birth and existence of the doctrine are not applicable to man, and it is believed that no court, and no writer, has heretofore asserted such an application. Among the many reasons for the non-applicability of this doctrine to the acts of man, discoverable by a study of the cases, is the primitive one, that with all law and at all times, man has been recognized as a rational being, not possessing and incapable of exercising the propensities of the dog, or other animal, but pos-

sessed of the faculties of a rational and responsible actor and punishable as such, for any criminal transgression; that being the only way, known to all law, to regulate the action of man, except when devoid of this rational element, in which case he would be placed *custodia legis*.

Upon the ground of public policy, and as an essential in the regulation and protection of diversified rights in communities, this elementary law (that the only remedy for a crime, is the punishment, civilly and criminally, of the person who commits it) has been modified, or changed, with respect to innkeepers, carriers of passengers, assaults, etc., committed by servants, while acting within the line of their duty, and now by the Pennsylvania (*Rommel v. Schambacher* (1887), 126 Pa. 582; s. c., 27 AMER. LAW REG. 156) and Minnesota courts (in *Ahlbeck v. St. Paul, P. M. & M. Co.*, and *McCord v. Western Union Tel. Co.*, *supra*, pp. 23, 24), to places open to and for the entertainment of the public. In these cases, the principal is held responsible for the assaults, or insults, which he did not commit. He is punished *civiliter*, for a crime which another committed, because public policy exacts the duty of protection in such cases, and holds him, who is required to exercise that duty, liable for any failure or neglect.

Within the law governing the liability of innkeepers, may be found the whole and true principle for holding one man civilly responsible for a crime committed by another, and the application of this doctrine to the other classes, is not the advancement of a new principle in the law. There is no difference between the reasons which hold the innkeeper responsible, and those for holding a master liable for the assaults of his servant, while doing the business with which he was entrusted, and holding a railroad liable for assaults by

its employees. It is settled that a carrier is liable for an assault upon a passenger, whether committed by an employe or a stranger. Some jurisdictions place the liability on the ground of contract, and others on the ground of duty, while the minority of the cases exclude all liability for assault, unless committed by the servant within the scope of his duty, but do not define what is or what is not within the line of the servant's duty. Prominent in following this judicial jugglery is the Supreme Court of Ohio in (*Wiltmore v. L. M. R. R. Co.* (1869), 19 Ohio St. 110) holding the carrier not liable where the baggage checker struck the passenger with a hatchet whilst in the act of checking his baggage, on the ground that the servant was hired to check baggage and not to use the hatchet or assault passengers, hence he was acting outside the scope of his duty. Whether the principle for the liability is that of contract or duty, the weight of the decisions hold the carrier bound to protect the passenger during the ingress to the carriage, and the exit. The principle for the protection during the carriage *in the conveyance* of the carrier, is plain, no matter whether it rests on contract or duty, because it is only a distinction of terms, and not of substance, to say, that as matter of law, the passenger contracted for safe transportation (as most clearly announced in *Chamberlain v. Chandler* (1823), U. S. C. Ct. Dist. Mass., 3 Mason 242), or that the law imposes the duty of safe transportation.

For an assault committed on a passenger during the time he is being carried in the conveyance, the weight of the authority is that the *liability rests on contract*; namely, that the passenger contracted for safe transportation, and an assault is a breach of that contract; or, in other words, the law imposes the duty of safe transportation

by virtue of the contract, whether the breach is committed by a stranger, or by a servant, without respect to the question whether the servant was or was not acting within the scope of his duty: *Chamberlain v. Chandler*, *supra*, p. 27; *Nieto v. Clark* (1858), U. S. C. Ct., Dist. Mass., 1 Cliff. 145; *Goddard v. Grand Trunk R. R.* (1869), 57 Me. 202; *Craker v. Chicago, etc., Ry.* (1875), 36 Wis. 657; *Chicago, etc., R. R. v. Flexman* (1882), 103 Ill. 546; *Fa k t Co. v. True* (1878), 88 Id. 608; *Sherley v. Billings* (1871), 8 Bush. (Ky.) 147; *McKinley v. R. R.* (1876), 44 Iowa 314; *New Orleans R. R. v. Burke* (1876), 53 Miss. 200; *Bryant v. Rick* (1870), 106 Mass. 180; *Landreau v. Bell* (1833), 5 La. (O. S.) 434; *Flint v. Trans. Co.* (1868), 34 Conn. 554; *Pittsburgh, etc., R. R. v. Hinds* (1866), 53 Pa. 512; *Phila. & Reading R. R. v. Derby* (1852), 14 How. (55 U. S.) 468; *Seymour v. Greenwood* (1861), 7 Hurl., Nor. 354; *Moore v. Fitchburg, etc., R. R.* (1855), 4 Gray (Mass.) 465; *Weed v. Panama R. Co.* (1858), 17 N. Y. 362; *Milwaukee, etc., R. v. Finney* (1860), 10 Wis. 388; *Quigley v. Central Pac. R. Co.* (1876) 11 Nev. 350; *Malecek v. Tower Grove R. R. Co.* (1874), 57 Mo. 18; *Hanson v. European, etc., R. R. Co.* (1873) 62 Me. 84; *Pendleton v. Kinsley* (1871), U. S. C. Ct., Dist. R. I., 3 Cliff. 416; *Rounds v. Delaware, etc., R. Co.* (1876), 64 N. Y. 129; *Shea v. Sixth Ave. R. Co.* (1875), 62 Id. 180; *Cohen v. Dry Dock Co.* (1877), 69 Id. 170; *Stewart v. Brooklyn, etc., R. R.* (1882), 90 Id. 588; *Ramsden v. Boston & Alb. R. R.* (1870), 104 Mass. 117; *Terre Haute and Indianapolis R. R. Co. v. Jackson* (1882), 81 Ind. 19; *Wabash and St. Louis R. R. v. Rector* (1882), 104 Ill. 296; *Lynch v. Met. Elevated R. R.* (1882), 90 N. Y. 77; *Louisville, etc., R. R. v. Kelly* (1883), 92 Ind. 371; *International, etc., R. R. v. Kentle*

(1883), 2 Tex. Ct. App. 262; *Bryan v. Chicago, etc., R. R.* (1884) 63 Iowa 464. This liability is confined to the period during which the passenger was being carried in the carrier's conveyance; as where, during the carriage, the brakeman struck the plaintiff because he intimated that the brakeman stole his watch: *Chicago, etc., R. R. v. Flexman* (1882), 103 Ill. 546; where the clerk assaulted the passenger: *Sherley v. Bellings* (1871), 8 Bush. (Ky.) 147; where the conductor kissed a lady passenger: *Craker v. Chicago, etc., Ry. Co.* (1875), 36 Wis. 657; where the driver of the street car assaulted and beat the plaintiff: *Stewart v. Brooklyn, etc., R. R.* (1882), 90 N. Y. 588.

The other line of decisions exclude the theory of contract or duty arising out of contract, and place the liability on the ground of the servant acting within the scope of his employment; the rule being, if the servant committed the assault, or tortious act, within the line of his employment, the master was held liable, and if he did not so commit it, the master was not liable. The difficulty was in determining what was, and what was not, within the servant's line of duty, and this has been the trouble since the case of *Macmanus v. Cricket* (1800), 1 East 103, which introduced the rule. The jurisdictions which hold the carrier liable, on the ground of contract, or duty, must necessarily reject this rule, and it is not applicable to innkeepers, nor, in Pennsylvania (*Rommel v. Schambach*, r (1887), 126 Pa., 582; s. c. 27 AM R. LAW REG. 156) to saloons or places open to the public, and, by the decision in the principal case, not applicable to depot companies. Where the doctrine prevails, the decisions attempted to define the rule, some stating the test to be the answer to the question "Was the servant acting for his own purpose, or

the purposes, or behalf of the company?"—and others that "If the servant has the power to do the act, the master is responsible for the manner in which it was done,"—as, for instance, having the power to eject a passenger from the car, the carrier was held responsible, if the ejection was improper and unlawful: *Indianapolis, etc. R. R. v. Anthony* (1873), 43 Ind. 183; as ejection on a false charge, on improper grounds and abuse of the power: *Ramsden v. Boston & Alb. R. R.* (1870), 104 Mass. 117; *Higgins v. Waterliet, etc., R. R.* (1871), 46 N. Y. 23; *Passenger R. R. v. Young* (1871), 21 Ohio St. 518; *Redding v. South Carolina R. R.* (1871), 3 S. C. 1; *Schultze v. Third Ave.* (1880), 46 N. Y. Super. Ct. 211. On the other hand, the carrier was held not liable for the assault upon a passenger, by a brakeman: *Evansville R. R. v. Baum* (1866), 26 Ind. 70; nor for the driver of the car knocking a small boy from the platform: *Pittsburg, etc., R. R. v. Donahue* (1871), 70 Pa. 119; because in the former case the brakeman was not pursuing his duties as a brakeman when he committed the assault, that is, he did not assault the passenger while in the act of turning or regulating the brakes; and in the latter case, because the driver's line of duty was to drive and not to put any one off the car.

In the jurisdictions which hold the carrier liable on the ground of contract, or duty, arising from contract, the identical facts in *Evansville R. R. v. Baum* (1866), 26 Ind. 70, and *Pittsburg, etc., R. R. v. Donahue* (1871), 70 Pa. 119, were sufficient to hold the carrier liable: *Chicago, etc., R. R. v. Flexman* (1882), 103 Ill. 546. The reason of the conflict is that two different principles have been invoked, one following the doctrine of duty, and the other *respondet superior*; one, that it is a duty, which the law imposes and the principal cannot shirk, and

is therefore liable, whether he performs the duty personally, or delegates it to another; and the other depends upon the fact, whether the servant acted within the scope of his employment.

If it could be generally affirmed that a master is liable for the acts of his servant, tortious or contractual, while doing the business with which he is entrusted there would not occur so much trouble. The servant, *quoad* the business, is the master during the transaction of that business, as, for instance, the brakeman of the train represents the master during the whole trip, and whether he acts as brakeman, conductor, porter or car sweeper, the passenger and third persons have the right to hold the principal, present and acting in the person of the brakeman, and doing in all respects that which the principal would do if present. It is very narrow judgment to split such business up into as many divisions as the servant wishes, making one part the acts of the master, and the other part only binding on the servant; as, for instance, where the conductor stopped the train and took up the plaintiff's child: *Gilliam v. South, etc., R. R.* (1881), 70 Ala. 268; or set fire to the child: *Cooley* 68; it was held that the master was not liable. It was the servant's act, outside of the line of his duty to his master.

The distinction is too small. The master put into the hands of the servant the means by which the wrong was committed. He hired the wrong servant. If the master had been in charge of the train, or if he had hired a careful and proper servant, the train would not have stopped and the assault would not have been committed, nor the child fired. Hence, because he failed in his duty, by hiring the wrong servant, the master is exempt from liability for the wrongs his servant commits.

The objection is not directed to the substance of the doctrine, but to the

statement of it. If properly defined and properly applied, it is believed to be in perfect accord with the doctrine of duty. Take the case which first laid down the rule: *Macmanus v. Cricket* (1800), 1 East 103, and ask the question, which is the more sensible, to say that having put the servant in charge of a vehicle to drive to a certain place, the master is liable for all the acts of the servant while so driving the vehicle, because he is put there by the master to perform a duty which the master was bound to do; namely, to drive the vehicle and conduct himself so as not to do injury to another; or to say that the master is not liable, because the servant, instead of going on the direct road to do the business with which he was entrusted, went in a roundabout way and committed the wrong complained of. In the former case, the master is liable, because it was his duty to so use his property as not to injure another, whether he drove the vehicle himself, or entrusted the driving to his servant; and in the latter case, the question of route is the criterion.

Holding a master responsible for the willful wrong of the servant, is an infringement of the natural and primitive rule that man, being rational, is individually responsible for his own wrongs, and that one man should not suffer for the wrongs and sins of another. The term wrong, means willful, such as assaults and not negligence, or injuries resulting from want of care. This impingement was made for public policy, in the law of innkeepers, and applied to the doctrine of *respondet superior*, and the other branches above mentioned, but, because the principle for the impingement is nowhere advanced, and nowhere affirmed, the decisions have oscillated to and fro. That the principle above contended for, is the true and proper one, is supported by the reason-

1 discussions of the following

cases: *Phila. & Reading R. R. v. Derby* (1852), 14 How. (55 U.S.) 468; *Philadelphia, etc., R. R. v. Quigley* (1858), 21 How. (62 U.S.) 202; *Moore v. Fitchburg, etc., R. R.* (1855), 4 Gray. Mass. 465; *Pennsylvania, etc., R. R. v. VanDever* (1862), 42 Pa. 365; *Pittsburg, etc., R. R. v. Slusser* (1869), 19 Ohio St. 157; *Atlantic, etc., R. R. v. Dunn* (1869), Id. 162; *Dalton v. Beers* (1871), 38 Conn. 529; *Hopkins v. Atlantic, etc., R. R.* (1857), 36 N. H. 9; *Baltimore, etc., R. R. v. Blocher* (1867), 27 Md. 277; *Hanson v. European R. R.* (1873), 62 Me. 84; *N. w Orleans, etc., R. R. v. Hurst* (1859), 36 Miss. 660; *Sherly v. Billings* (1871), 8 Bush. (Ky.) 147; *Malecek v. Tower Grove R. R.* (1874), 27 Mo. 18; *Goddard v. Grand Trunk Ry.* (1869), 57 Me. 202, *Brand v. Schenectady, etc., R. R.* (1850), 8 Barb., N. Y., 368; *Seymour v. Greenwood* (1861), 7 Hurl. & Nor. 354; *Milwaukee R. R. v. Finney* (1860), 10 Wis. 388; *Pittsburg, etc., R. R. v. Hinds* (1866), 53 Pa. 512; *Weed v. Panama R. R.* (1858), 17 N. Y. 362; *Flint v. Transportation Co.* (1868), 34 Conn. 362; *Landreau v. Bell* (1833), 5 La. (O. S.) 434; *Chamberlain v. Chandler* (1823), U. S. C. Ct., Dist. Mass., 3 Mason 242; *Nieto v. Clark* (1858), U. S. C. Ct., Dist. Mass., 1 Cliff. 145.

About the best discussion is found in *Goddard v. Grand Trunk Ry.* (1869), 57 Me. 202; and the conclusion reached was that it was the duty of the carrier to protect the passenger against violence and insults of strangers, co-passengers and servants, and—"If this duty is not performed and this protection not furnished, but on the contrary, the passenger is assaulted and insulted * * by the carrier's servant, the carrier is responsible." The same conclusion is reached in *Rounds v. Delaware, etc., R. R.* (1876), 64 N. Y. 137, though the reasoning is laborious and not close; the

Court stated that the master who puts the servant in a place to do the master's business, is responsible for what the servant does through lack of judgment, or discretion, or from infirmity of temper, or under the influence of passion, beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another. This reasoning was followed in *Cohen v. Dry Dock Co.* (1877), 60 N. Y. 170. The same line of argument was advanced in *Craker v. Chicago R. R.* (1875), 36 Wis. 657; and in the cases there cited, where the Court said that it would be cheap and superficial morality to allow one owing a duty to another, to commit the performance of this duty to a third person, and be exempt from responsibility for the malicious conduct of the substitute.

The reasoning in *Craker v. Chicago R. R.* (1875), 36 Wis. 657; is well enforced by the case cited in the opinion. The same reasoning and doctrine were advanced in *Stewart v. Brooklyn, etc., R. R.* (1882), 90 N. Y. 588; which re-

puicates some earlier cases, among them *Isaac v. The Third Avenue R. R.* (1871), 47 N. Y. 122, and which follows *Goddard v. Grand Trunk R. R.* (1869), 57 Me. 202, and *Craker v. Chicago, etc., R. R.* (1875), 36 Wis. 657; and the line of cases advanced to support the doctrine stated by the writer. The argument advanced in *Isaacs v. The Third Avenue R. R.* (1871), 47 N. Y. 122, is the same as that found in *Parker v. Erie, etc., R. R.* (1875), 5 Hun. (N. Y.) 57; *Little M. R. R. v. Wilmore* (1869), 19 Ohio St. 110; *Ward v. Omnibus Co.* (1873), 42 L. J. C. P. 265; *Evansville v. Baum* (1866), 26 Ind. 70; *Great Western R. R. v. Miller* (1869), 19 Mich. 305; *Priest v. Hudson River R. R.* (1871), 40 How. Pr. (N. Y.) 456; *Johnson v. Chicago, etc., R. R.* (1882), 58 Iowa 348; and has not that weight of reason and logic in support which are contained in the other cases.

JNO. F. KELLY.

St. Paul, Minn.

Supreme Court of Texas.

INSURANCE CO. OF NORTH AMERICA

v.

EASTON ET AL.

A warranty in a policy of fire insurance, that "this insurance shall not inure to the benefit of any carrier," does not contravene public policy, nor is it in restraint of trade.

Although a stipulation in a bill of lading, which gives the carrier the benefit of any insurance upon the goods carried, is valid; and, in case of loss, will defeat the insurer's right of subrogation, the insured, by entering into such a contract, forfeits all rights under a policy containing a warranty that the insurance shall not inure to the benefit of any carrier, nor can a carrier acquire any rights under such a policy.

It is immaterial, in such case, that the contract of insurance was made without the carrier's knowledge or privity.

Appeal from District Court, Galveston County.

Action by Nelson S. Easton and others, Receivers of the Houston & Texas Central Railway Company, against the Insurance Company of North America. Judgment for plaintiffs, and defendant appeals.

Hume & Kleberg, for appellant.

Willie, Mott & Ballinger, for appellees.

STAYTON, C. J., March 1, 1889. This case comes before us on an agreed statement, made from the record, and signed by counsel, which is as follows :

On the 22d day of June, 1885, appellant, a corporation having its domicile in the State of Pennsylvania, issued an open policy to Callender & Magnus, cotton buyers, residing in New York City. This policy was renewed September 1, 1886, for one year, subject to certain conditions and the following express warranty: "Warranted that this insurance shall not inure to the benefit of any carrier." Under the terms of the open policy all cotton purchased by Callender & Magnus, or by their agents for them, in the United States, was at once covered by the same as soon as purchased, they reporting as soon as practicable to the insurance company the particulars of the purchase, as to marks, value, amount of insurance desired, etc. The insurance company would then issue to Callender & Magnus a certificate of insurance, giving date from which insurance began, number of bales insured, amount of insurance, locality of cotton, and its intended route of shipment. But the insurance as such was complete under the said open policy as soon as the cotton was purchased, even before the certificate was issued; the certificate being only a statement giving the details of the particular transaction, such as value, amount insured, and route of shipment, but without in any manner altering or modifying the terms and conditions of the open policy, or the conditions and warranty contained in the aforesaid renewal thereof. The purpose of an open policy is convenience to the assured, and to insure his property from the very moment of its acquisition. This could not be done if he was required to make a separate contract for each lot of cotton which he may purchase in different parts of the country. The danger and risk which would necessarily intervene after the purchase is

made until insurance could be effected by special policy, would have to be borne by the owner. Upon the open policy, however, the owner is protected by the insurance upon all purchases, no matter where and when made, and though loss should occur before report of the purchase to the insurer, or issuance of the certificate of insurance. Premiums under the policy in this case were payable monthly upon amounts insured thereunder for that period.

On the 9th day of December, 1886, Callender & Magnus, by one of their agents, bought and became the owners of fifty bales of cotton at Mexia, Tex. The advice of this purchase reached the office of the appellant insurance company some time thereafter, and said company, on the 16th of said month, issued to Callender & Magnus a certificate of insurance. The certificate provides that it represented and took the place of the policy, and conveyed all the rights of the original policy-holder (for the purpose of collecting any loss or claim) as fully as if the property was covered by a special policy direct to the holder of the certificate, and the certificate was dated New York, December 16, 1886.

On the 11th day of December, 1886, Callender & Magnus, by their agents, delivered to appellees, who are common carriers, at the town of Mexia, Tex., to be shipped to Liverpool, England, the said fifty bales of cotton, and on the same day appellees delivered to the said agents of Callender & Magnus a bill of lading containing, among other things, the following provision—

“In case of any loss, detriment, or damage done to, or sustained by, any of the property herein receipted for during such transportation, whereby any legal liability shall or may be incurred, that company alone shall be answerable therefor in whose actual custody the same be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have full benefit of any insurance that may have been effected upon or on account of said cotton.”

On the 12th day of December, 1886, while said cotton was in the custody of appellees, in their capacity as common carriers, forty bales thereof, of the value of \$1,725.34, were totally destroyed by fire. The appellant was notified of the destruction of the cotton December 21, 1886. When the appellant issued the certificate of insurance to Callender & Magnus it

had no notice or knowledge of that clause in the bill of lading which provides that the carrier of said cotton shall have the benefit of any insurance which may have been effected upon or on account of said cotton. The fact that such clause was contained in said bill of lading was first brought to the knowledge of appellant when the bill of lading was presented to it, as one of the proofs of loss required, some time after the 21st of December, 1886. Appellees had no actual notice of the warranty in the policy stipulating that the insurance should not inure to the benefit of any carrier, and, being liable for the loss of the cotton as common carriers, paid the same, whereupon Callender & Magnus transferred to them the certificate of insurance. Appellant declined to pay the policy to Callender & Magnus because the same had been forfeited by their acceptance of the bill of lading. Appellant declining to pay for the loss, appellees, on the 27th of September, 1887, sued it in the District Court of Galveston county. That Court held the clause in the policy, providing that the instrument shall not inure to the benefit of any carrier, to be void, because in restraint of trade and against public policy, and rendered judgment for appellees for \$1,725.34. From this judgment the Insurance Company of North America appeals, and the following questions of law, embraced in the assignments of error, are now by agreement respectfully submitted to this Court for its decision: (1) Is the warranty in the policy, which provides that the insurance shall not inure to the benefit of any carrier, a valid and lawful stipulation in the contract of insurance, and does a violation thereof forfeit the policy, or is said warranty in restraint of trade and contrary to public policy? (2) Under the particular facts of this case, irrespective of any rights which Callender & Magnus may have had under the contract of insurance, can appellees under the law recover against the appellant?

It must now be held that so much of the clause in the bill of lading as provided that "the carrier so liable shall have full benefit of any insurance that may have been effected upon or on account of said cotton," is not invalid by reason of its contravening any rule based on public policy: *Insurance Co. v. Railway Co.* (1885), 63 Tex. 475; *Insurance Co. v. Transportation Co.* (1886), 117 U. S. 312; *Inman v. Railway Co.* (1889),

129 U. S. 128; *Rintoul v. Railroad Co.* (1883), U. S. Circ. Ct., S. Dist. N. Y., 17 Fed. Repr. 905; *Platt v. Railroad Co.* (1888), 108 N. Y. 358; *Jackson Co. v. Insurance Co.* (1885), 139 Mass. 508. In the case first referred to, the bill of lading was prior, in point of time, to the policy, which recited the fact of shipment, and it was held that this was sufficient evidence that the policy was issued, with notice of the right secured by the carrier by contract, and in subordination to that right. The same ruling was made in the second case cited, in which it is assumed that the contracts of carriage and insurance were made simultaneously, the insurer being ignorant of the clause in the bill of lading which subrogated the carrier to the rights of shipper under the policy. In disposing of the case the Court said—

“The policy containing no express stipulation upon the subject, and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defense to an action on the policy, according to the careful judgments rendered in June last, and independently of each other,—the one by the English Court of Appeal, and the other by the Supreme Judicial Court of Massachusetts: *Tate v. Hyslop* (1885), L. R. 15 Q. B. Div. 368; *Jackson Co. v. Insurance Co.* (1885), 139 Mass. 508.”

In *Inman v. Railway Co.*, *supra*, it appeared that the policy issued some time before the shipment was made, and, while recognizing the validity of a contract between the shipper and carrier, whereby the latter should become entitled to the benefit of insurance made by the former in a proper case, the Court said—

“The policies here were all taken out some weeks before the shipments were made, although, of course, they did not attach until then, and recovery upon neither of them could have been had, except upon condition of resort over against the carrier, any act of the owners to defeat which operated to cancel the liability of the insurers. They could not, therefore, be made available for the benefit of the carrier.”

In *Jackson Co. v. Insurance Co.*, *supra*, it was assumed that the carrier might contract for the benefit of insurance secured by the shipper, and the inference to be drawn from the report of the case is, that the policy, made the basis of the action, was issued after the right of the carrier to the benefit of insurance had attached. The shipper bought through a broker, who it seems did not read the receipts securing to the carrier

the benefit of insurance. The railroad's receipt, with draft attached, was forwarded by the broker to the shipper, the draft cashed, notice given to the insurance company of the shipments, and the policy presented, that the shipment might be evidenced thereon, which was done. This seems to have been the act which applied the insurance to the cotton destroyed while in transit, and no inquiry was made as to the terms of shipment when insurance was thus obtained. In disposing of the case the Court said—

“That the contract between the plaintiff and the carrier was binding and valid being conceded, we are brought to the conclusion expressed in the ruling of the Judge who presided at the trial, ‘that in a case where there was no intention to deprive the insurance company of its rights, and no intentional fraud and concealment, and where the plaintiff (shipper) was actually ignorant of the stipulation relied on at the time it made the insurance or obtained the indorsement on the policy, and was ignorant, when it ordered the cotton, that any such stipulation would be made, and there was no actual misrepresentation, an insurance company insuring property *in transitu*, making no provision in regard to the nature of the contract of carriage, and not requesting to see the bill of lading or receipt, and making no inquiries about them, must be held to have insured it under and subject to the actual contract of carriage, so far as it was a lawful contract.’”

Under this state of facts it was held that the carrier, by virtue of its contract, became subrogated to all rights held by the shipper against the insurer; and that thus was defeated the right of the insurer to be subrogated, on payment of the loss, to the right against the carrier, to which, but for the contract of shipment, the insurer, under the settled principles of law, would have been entitled. This case, while holding that the right of the insured, when dependent only on his relation to the carrier, to modify by contract the rule of subrogation, cannot be questioned, concedes that no contract made between the insured and the insurer, whereby the right to modify the general rule of subrogation is withdrawn from the insured, can be controlled by a contract between the insured and the carrier.

In *Insurance Co. v. Cables* (1859), 20 N. Y. 175, it was held that a contract between a carrier and shipper, substantially such as is set up in this case, was valid; and on payment of a loss under a policy issued after the contract for carriage was made, the right of subrogation was denied to the insurer. In disposing of the case the Court said—

"It is argued that this clause in the contract did not exempt the carriers from liability to the plaintiffs, because it was made without their knowledge or consent, and was an attempted fraud upon their rights. But this is not so in point of fact, so far as the defendants are concerned. The contract between them and the insured was made before any insurance was obtained; and though it sought to secure a right to the defendants in case policies were procured, yet on their part no fraud was contemplated on the plaintiffs,—none is found by the Court. It is true the case states that the plaintiffs did not know of the contract when they issued their policies. That was a matter between them and the insured. If there was any fraudulent concealment of facts on the part of the latter at the time they obtained their insurances, it would have avoided the policies, and they would not have been bound to pay the loss. If they paid it voluntarily, they are not entitled to be subrogated."

In this case, as in the others, but one, considered, there was no contract between the insured and insurer, at the time the contract between the carrier and the insured was made, which restrained them from modifying or entirely annulling the ordinary rule of subrogation if they saw proper to do so by contract.

The cases referred to hold: (1) That contracts, such as contained in the carrier's contract before us, are valid as between the carrier and shipper. (2) That a policy issued with knowledge that the insured property is in transit, in the absence of inquiry as to the terms of shipment, misrepresentation as to this or other matter material to the risk, or fraud, will be deemed to have been issued in subordination to the contract of shipment, which may control the right of the insurer to subrogation. None of them, however, hold that a contract of insurance, existing when a contract of carriage is made, whether the carrier have knowledge of the insurance contract or not, can be controlled by a subsequent contract between the insured and the carrier, and the insurer's right to subrogation thus be destroyed, even when there is no express provision in the policy which forbids this. It must be that, in the absence of stipulation in a policy to the contrary, the insured may, without invalidating his policy, make such contracts with a carrier, limiting the liability of the latter, as may be lawful under the laws in force at the place of shipment, or such other laws as may be applicable; for the parties ought to be presumed to contract with reference to the right of the carrier to refuse to receive and transport freight

without contract, limiting his liability in so far as this may lawfully be done under the law governing the shipment. With the carrier's liability lawfully restricted by contract, a loss resulting from a cause within the restriction would not give right of action in favor of the insured shipper against the carrier; and where this is the case there can be no subrogation under the general principles applicable to the subject.

The contract relied on by the carrier in this case was not one it had the right to have made, or otherwise the right to refuse to receive cotton for transportation; and it ought not to be presumed that the parties to the insurance contract contemplated that the affreightment would be made practically at the entire risk of the insurer, when the carrier had no right to insist that this should be so, and when the general rules of law, with reference to which they ought to be presumed to have contracted, fix on the carrier the ultimate liability for a loss occurring while the freight is in his hands, unless the loss arises from a cause that relieves the carrier from liability. The carrier's liability is held to be the ultimate liability, simply because the loss of property, while in his custody as carrier, results in fact or in legal contemplation from his failure of duty, while that of the insurer is held to be that only of an indemnitor, in all cases in which the insurance contract does not stipulate to the contrary, or in which a contrary instruction may not fairly be inferred from the time and circumstances of the contract. It seems to us, under the facts of this case, leaving out of consideration the warranty contained in the contract of insurance, that the right of the insurer to subrogation on payment of the loss is as well secured when there is not, as well as when there is, an express contract that the right to subrogation shall exist; and that a contract between the insured and the carrier which defeats this right would defeat the right of the insured or the carrier to recover at all upon the contract of insurance. It has been held that, where a policy expressly gives the insurer the right to subrogation against the carrier, a subsequent agreement between the insured and the carrier that the latter shall be subrogated to the right of the insured avoids the policy: *Carstairs v. Insurance Co.* (1883), U.S. Circ. Ct., Dist. Md., 18 Fed. Repr. 473. The correctness

of this ruling was recognized in *Jackson Co. v. Insurance Co.* (1885), 139 Mass. 511. If the insured wishes insurance that will place the ultimate liability on the insurer, let him so make his contract as to protect the carrier afterwards to be selected by them; compensate the insurer for the increased risk of ultimate loss; and be in position to contract with the carrier for reduction in freight, such as may be proper by reason of this shifting of the ultimate risk of loss from the carrier to the insurer.

Passing from this, however, it is certainly true that the insured could not confer on the carrier a right he did not possess. The warranty which the insurance company seeks to assert to avoid liability to the carrier was one promissory in character, in which the parties contracted "that this insurance shall not inure to the benefit of any carrier." This, if a valid provision, cuts off any construction of the policy whereby it could possibly be held to confer any right to benefit under it on a carrier of the property insured, and it deprives the insured of the power to confer on such carrier any right to benefit under the policy by contract or otherwise. By the warranty we understand the parties to have contracted that the contract of insurance should be avoided—should cease to be operative—if during the time specified for its continuance the insured should so contract with a carrier of the property insured as, between themselves, to give to the carrier any right to benefit under the policy. The purpose of this provision evidently was to deny, in terms, to the insured the right of power to confer on the carrier any right to benefit through the policy, such as the cases to which we have referred hold may be conferred on the carrier by contract with the shipper made before insurance is obtained. The insurer, in effect, says in the face of the policy,—and to this the insured assents—

"This contract shall be binding on me only so long as you refrain from contracting with any carrier you may employ to transport the insured property that he shall have right to any indemnity from me for loss occurring, while the property is in his possession as carrier, from a cause which, under the rules of law applicable to the contract of carriage, would give you cause of action against such carrier; and I will not be longer bound by this contract if you in any manner release such carrier from that full liability to you and to me which will exist under a lawful contract of affreightment for loss of the insured property while in his hands as carrier."

By requiring the carrier's liability to continue the ultimate liability, the insurer doubtless intended to make the carrier's own interest some guaranty against its own negligence or misconduct. In the very act of making the contract through which the carrier in this case claims, the policy ceased to be of any effect whatever, as to the particular cotton at least, and from that time forward neither the insured nor the carrier could assert a right under it, based on the particular loss, if the warranty was valid.

The Court below held that the warranty was invalid, because in restriction of trade, and against public policy. The insurance company was under no legal obligation to issue a policy at all, but, if it did, it had the right to place a provision in the policy such as it did, and in so doing it neither contravened any public policy nor restrained trade. It is said that the carrier had no notice of the clause in the policy now relied upon, and that for this reason it would be contrary to public policy to permit it now to rely upon the warranty. The law does not require that notice shall be given to third persons of contracts of insurance, nor does it provide a mode in which such notice may be given whereby all persons will be bound. If the want of notice of a contract become important in a contest between a party to it and a third person, who has sought to acquire by contract an interest or right antagonistic to the right the former contract gives, it is not because the former contract was illegal, but because some equitable consideration has arisen on account of which the person who has kept secret his right ought not to be permitted to assert it against one whom he has misled by his silence. If the mere want of notice of contracts would place them on the list of contracts condemned because contrary to public policy, then there would be a long list of condemned contracts, not heretofore even suspected of illegality. The carrier knew that no right could be acquired against the insurer through a contract with the insured other than the latter possessed and had power to convey, and if it desired to know the extent of that right it was its duty to inquire. Appellee makes this inquiry: "Could the insurance company and the owner of the cotton, without the knowledge or privity of the carrier, make a contract be-

tween themselves by which the carrier would be deprived of its well-recognized legal rights? Is not such a restriction against public policy, and in restraint of trade?" Neither the knowledge of nor privity of the carrier to the insurance contract was necessary to its legality. The carrier had no legal right, recognized or unrecognized, to have the insurance company or the insured to make any contract of insurance whatever, much less to make one the insurance company was under no obligation to make, and had refused to make. The terms of the policy neither restrained appellee nor any other carrier from making lawful contracts for carriage at any place, nor from carrying them out anywhere; they simply denied to the insured the right to make a contract which would bind the insurer as the carrier desired it to be bound.

Two further inquiries and suggestions are made by appellee: "Then, knowing the law,—knowing that the carrier had the right to stipulate for the benefit of any insurance that may have been effected,—knowing that the shipper could not refuse to accept from the carrier a bill of lading with that provision,—will appellant be permitted to receive premiums, and at the same time insert a clause in its policy of insurance which would exonerate it from the payment of any loss?" "Appellant refused to pay the policy to Callender & Magnus because the same had been forfeited by their acceptance of the bill of lading. This excuse might have had some force if they had any option, but it was the law of Texas and the United States that the carrier had the right to issue such a bill of lading. Callender & Magnus had no right to refuse to receive it." Appellant, corporation though it is, is affected with knowledge of the law; but, admitting this, we think it cannot be charged with knowledge that the propositions here made are the law. It knew that the carrier might stipulate for the benefit of such insurance as the insured had the power and right to convey; but it did not know that the insured and carrier might make a contract for it without its consent, and contrary to the express stipulation of the policy. We think it did not know that the shipper had not the right to reject the bill of lading on which appellee now bases its right, containing the clause in regard to insurance; for we understand it was the right of the shipper

to reject that bill of lading, and to have their cotton transported on one that did not contain that provision. A refusal to give the carrier the benefit of insurance already secured, would be, in effect, but a refusal to insure for the benefit of the carrier, and this a carrier cannot require as a condition on which it will receive and transport freight. If there be any question of unearned premium, it is not presented in this case. The policy having ceased to be operative, and that being the foundation of all obligation on the part of the insurance company, the certificates subsequently issued, and transferred subsequently to the loss, conferred no right on the carrier. The judgment of the Court below will be reversed, and judgment here rendered for appellant.

It is so ordered.

The consideration of the principal case involves at least four different questions: (1) The insurer's right of subrogation. (2) The insurable interest of the carrier. (3) The effect of a stipulation that the carrier shall have the benefit of the owner's insurance upon goods consigned. (4) The effect of a warranty in the policy that the insurance shall not inure to the benefit of any carrier.

1. *The insurer's right of subrogation.*—It may be accepted as settled law that an insurer, upon payment of a loss, "becomes subrogated to all the assured's rights of action against third persons who have caused, or are responsible for, the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insured. From the very nature of the contract, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss:" *Phoenix Ins. Co. v. Erie Transportation Co.*

(1886), 117 U.S. 312; s.c., 25 AMER. LAW REG. 330. "It is, as a general principle, true," says DEVENS, J., in *Jackson Co. v. Boylston Mut. Ins. Co.* (1885), 139 Mass. 508, "that, if goods are injured by transportation under such circumstances that the carrier and the insurer are alike liable therefor, and the insurer pays for such injury, he will be subrogated to such claim as the owner may have against the carrier. And this, apparently, because the liability of the carrier is treated as primary, while that of the insurer is secondary only. The contract of insurance being one of indemnity, the insurer, when he has indemnified the insured, is equitably entitled to succeed to the right which he had against the carrier."

The general principle stated in these cases was long since recognized in England in the cases of *Randal v. Cockran* (1748), 1 Ves. Sr. 93; *Mason v. Sainsbury* (1782), 3 Doug. 61; *Clark v. Inhabitants of Blything* (1823), 2 B. & C. 254; *Yates v. Whyte* (1838), 4 Bing. N. C. 272. Following the English decisions, Chief Justice SHAW held, in *Hart v. Western R. R. Corporation* (1847), 13 Met. (Mass.) 99, that an in-

insurance company, having paid a fire loss, occasioned by sparks negligently communicated to the insured property from a railroad company's locomotive, was subrogated to the insured's right of recovery against the railroad. The principle was again applied by Chief Justice GIBSON, in *Gales v. Hailman* (1849), 11 Pa. 515, to the case of goods lost while in the custody of a common carrier. In both of these cases it was held that the action must be in the name of the shipper, who, to the extent of the indemnity received by him from his insurer, sues as trustee for the insurer. The carrier cannot set up the payment made by the insurer, as satisfaction, in whole or in part, of the claim, nor can he call upon the insurer for contribution. These decisions were followed by the Supreme Court of the United States in the case of goods destroyed by accidental fire, while in course of transportation by a common carrier: *Hall v. Nashville & C. R. R. Co.*, 13 Wall. (80 U.S.) 367, where the right of the insurer to subrogation, admitted on the argument to prevail in cases of marine insurance, was held to apply equally to cases of fire insurance upon land. The general principle was again recognized in *The Potomac* (1881), 105 U. S. 630, and in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* (1889), 129 Id. 397.

In England the early decisions have been consistently followed: *White v. Dobinson* (1844), 14 Sim. 273; *Dickenson v. Jardine* (1868), L. R. 3 C. P. 639; *Simpson v. Thomson* (1877), L. R. 3 App. Cas. 279; *Quebec Fire Assr. Co. v. St. Louis* (1851), 7 Moo. P. C. 286; *Darrell v. Tibbitts* (1880), L. R. 5 Q. B. D. 560. The two cases last cited arose out of contracts of fire insurance.

Other cases in which the doctrine of subrogation has been recognized as applying to rights of action against wrongdoers, for damages done to property which is the subject of insurance are:

Rockingham Mut. Fire Ins. Co. v. Bosker (1855), 39 Me. 253; *Bean v. Atlantic & St. L. R. R. Co.* (1870), 58 Id. 82; *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. R. Co.* (1856), 25 Conn. 265; *Peoria M. & F. Ins. Co. v. Frost* (1865), 37 Ill. 333; *Monmouth County Mut. Fire Ins. Co. v. Hutchinson* (1870), 21 N. J. Eq. 107; *Connecticut Fire Ins. Co. v. Erie Ry. Co.* (1878), 73 N. Y. 399; *Platt v. Richmond, Y. R. & C. R. R. Co.* (1888), 108 Id. 358; *Swarthout v. Chicago & N. W. Ry. Co.* (1880), 49 Wis. 625; *Hustisford Farmers' Mut. Ins. Co. v. Chicago, M. & St. P. Ry. Co.* (1886), 66 Id. 58. The only case which denies subrogation to the insurer is *Carroll v. New Orleans, J. & G. N. R. R. Co.* (1874), 26 La. An. 447, which was the decision of a divided Court, and has not been reaffirmed. The facts of that case were very similar to those of the principal case, the action being against a common carrier for the value of cotton destroyed by fire while in transit. In his dissenting opinion, TALIAFERRO, J., says: "I am clearly of the opinion the insurance company stands subrogated by law to all the rights of the owners against the carriers, as they certainly are upon general principles of equity." In the case of *Hartford Ins. Co. v. Pennell* (1878), 2 Bradw. (Ill.) 609, the Court went so far as to restrain the insured, at the suit of the insurers, who had paid him the loss, from making a settlement of his claim against the alleged wrong-doer.

When the insurer, by reason of the payment of the loss, has become subrogated to the rights of the insured, he may recover, in a suit against the carrier, brought in the name of the insured, the full amount of the loss or damage, without regard to the amount of the policy of insurance: *Mobile & M. R. R. Co. v. Jurey* (1883), 111 U. S. 584. And in such a suit the carrier cannot defend on the ground that the

insurer has failed to interpose a defense, which might have been successfully made to the claim upon the policy: *Sun Mut. Ins. Co. v. Mississippi Valley Transp. Co.* (U. S. C. Ct., E. D. Mo., 1883), 17 Fed. Repr. 919.

2. *Insurable interest of the carrier.*—

A common carrier has an insurable interest in the goods carried for hire by him: *Buck v. Chesapeake Ins. Co.* (1828), 1 Pet. (26 U. S.) 151; *Crowley v. Cohen* (1832), 3 B. & Ad. 478; *London & N.W. Ry. Co. v. Glyn* (1859), 1 E. & E. 652; *Van Natta v. Mut. Security Ins. Co.* (1849), 2 Sandf. (N. Y.) 490; *Chase v. Washington Mut. Ins. Co.* (1852), 12 Barb. (N. Y.) 595; *Savage v. Corn Exchange Fire & I. N. Ins. Co.* (1858), 1 Bosw. (N. Y.) 1; *Eastern R.R. Co. v. Relief Fire Ins. Co.* (1868), 98 Mass. 420; *Commonwealth v. Hide and Leather Ins. Co.* (1873), 112 Id. 136; *Jackson Co. v. Boylston Mut. Ins. Co.* (1885), 139 Id. 508. "It is well settled that an insurable interest, in mercantile language, does not necessarily import an absolute right of property in the thing insured. A special or qualified interest is equally the subject of insurance; and it has often been determined that each distinct interest in the same subject may be protected by a separate policy on the subject, for the party interested in it. The mortgagor and mortgagee may both insure; so may the trustee and the *cestui que trust*; and so may every party who has any special interest to protect, or who represents the property as the qualified owner of it." *De Forest v. Fulton Fire Ins. Co.* (1828), 1 Hall (N. Y.) 84. This case, in which the principles involved were most elaborately considered and which has always been recognized as a leading authority, determined the right of a commission merchant to insure goods consigned to him for sale. But its reasoning is equally applicable to the case of a carrier. Indeed, the carrier's interest

is greater than that of a commission merchant, for the carrier has not only a lien upon the goods for his transportation charges, but he is absolutely liable, as an insurer, to the owner for their safe delivery, unless destroyed by the act of God or the enemy of the country: *Chase v. Washington Mut. Ins. Co.*, *supra*. If the carrier should recover from the insurer an amount larger than his interest in the goods, he would hold the excess as trustee for the owner: *De Forest v. Fulton Fire Ins. Co.*, *supra*; Wood on Fire Insurance, § 514.

3. *Effect of stipulation that the carrier shall have the benefit of the owner's insurance.*—The first case in which the effect of such a stipulation in a bill of lading was considered, was *Mercantile Mut. Ins. Co. v. Calebs* (1859), 20 N. Y. 173, which is cited in the principal case. This was a case of inland marine insurance. The underwriters brought suit against the carriers for the value of goods insured by the latter and lost while in course of transportation, and the carriers set up in defence to the action a stipulation in the bill of lading giving them "the benefit of any insurance by or for account of" the owners and insured. The Court (ALLEN, J.) used the following language: "If there had been no special agreement between the insured and the defendants, under the facts as found, the plaintiffs would undoubtedly have been entitled to recover, if the defendants were liable for the loss of the goods. * * * The question then arises, was the special contract between the insured and the defendants a valid one? and if so, what is its effect upon the plaintiffs' right to recover? It has been frequently decided that a common carrier may, by special contract, limit, restrict, or modify, his common law liability as an insurer of the transportation of goods. In the case of *Gould v. Hill* (1842), 2 Hill (N. Y.) 623, a majority of the Court held otherwise,

but this Court, in *Dorr v. New Jersey Steam Nav. Co.* (1854), 11 N. Y. 485, held the contrary, and overruled the case of *Gould v. Hill*; and it had previously been repudiated in *Parsons v. Monteath* (1851), 13 Barb. (N. Y.) 353, and in *Moore v. Evans* (1852), 14 Id. 524 (see also *New Jersey Steam Nav. Co. v. Merchants' Bank* (1848), 6 How. (47 U. S.) 344). The Court in all these cases say that they see no reason why parties may not contract as they please in reference to the transportation of goods; that such an agreement neither changes nor interferes with any rule of law, and does not affect public morals or conflict with public interests. If the owner chooses to take upon himself part of the risk of transportation, and thereby induces the carrier to convey for a less rate of compensation, who has any right to complain? It is a matter entirely between themselves, unless it is the result of a scheme to defraud third persons. It has long been determined, both in England and in this country, that such an agreement is valid and binding, and in the absence of fraud can at all times be enforced."

The general rule here stated so broadly, although still followed in New York, has not been recognized to its full extent by other jurisdictions: *New York Cent. R.R. Co. v. Lockwood* (1873), 17 Wall. (84 U. S.) 357; *Ogdensburg & L. C. R.R. Co. v. Pratt* (1874), 22 Id. (89 U. S.) 123; *Bank of Kentucky v. Adams Express Co.* (1876), 93 U. S. 174; *Grand Trunk Ry. of Canada v. Stevens* (1877), 95 Id. 655; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* (1889), 129 Id. 397; *Forepaugh v. Delaware, L. & W. R.R. Co.* (1889), 24 W. N. C. (Pa.) 385. But the correctness of the ruling which sustained contracts similar to that now under consideration, has never been disputed. In *Rintoul v. New York Cent. & H. R. R. R. Co.* (U. S. C. Ct., S. D. N. Y.,

1883), 17 Fed. Repr. 905; & C., 21 Blatchf. 439, the same view of the law was taken. This case was reported in full in 23 AMER. LAW REG. 294, with a valuable annotation, in which the validity of such stipulations was discussed at length. The annotator, in concluding, expresses some doubt as to whether the rule there followed by Judge SHIPMAN was sound in principle or not. But subsequent decisions have removed all uncertainty from the question, and it must now be regarded as accepted law.

In the year 1885 two cases were decided, one in Texas and one in Massachusetts, in each of which the validity of the stipulation under discussion was affirmed. In the former case, *British & F. M. Ins. Co. v. Gulf, C. & S. F. Ry. Co.* (1885), 63 Tex. 475, it was said: "The right to insert such a stipulation as the present is universally admitted, or denied, if at all, only on the ground of the supposed effect it has of restricting the common law liability of a carrier. This, in our view, is not the effect of the reservation. * * * The right of the insurance company to recover against the railroad company, if it existed at all, was the result of an equitable subrogation to the remedy of the owner of the cotton against the carrier, and of the assignment made subsequent to its loss. But the assignment was worthless, as it was made in privity and subordination to the previous stipulation placed in the bill of lading; and the subrogation was of no avail, as no one can become subrogated to a right which the party originally possessing that right had previously contracted should not be enforced." In the other case, *Jackson Co. v. Boylston Mut. Ins. Co.* (1885), 139 Mass. 508, the Massachusetts Court places its decision upon the following grounds: "As the insurance company obtains its remedy against the carrier, not by virtue of any contract of its own with him, but through the contract of the owner of the

goods, such owner may make the contract of carriage so as to suit his own interest, provided there is no fraudulent concealment from the insurer; and the right which the insurer obtains is subject to the agreement with the carrier. Carriers have an insurable interest in the goods they transport, and may therefore effect insurance upon them for their own benefit. There is no reason why they may not insure them jointly with the owner, and, if so, why they may not contract for the benefit of insurance effected by the owner, in the absence of fraud or any contract to the contrary with the insurer. The owner is under no obligation to contract so that he shall have a remedy against the carrier under every circumstance in which the carrier has been held liable by the common law. If he may accept a receipt excusing the carrier from liability from fire, and still hold the insurer, he may also make a contract that the insurance shall be for the benefit of the carrier."

In the case just cited it was also held that the insured's contract to give the carrier the benefit of the insurance was not in violation of a condition of his policy, prohibiting the sale, assignment, transfer or pledge of such policy, or the interest insured thereby, without the written consent of the insurer. "The policy and interest in it are still retained by the owner; it is neither transferred nor pledged. There is a collateral agreement only, that the carrier, having incurred a liability, shall have the benefit of the insurance that may have been effected:" *Jackson Co. v. Boylston Mut. Ins. Co.*, *supra*.

As stated in the principal case, the validity of contracts such as the one in question was recognized in *Tate v. Hy-slop* (1885), L. R. 15 Q. B. D. 368, which was a case of marine insurance. The insurer was accustomed to charge a higher rate of premium upon shipments under contracts giving no recourse

against the carrier, except for negligence. This practice was known to the insured, who failed, however, to inform the insurer that he had entered into such a contract. His concealment of this fact was held to have been fraudulent and to have vitiated his policy.

The Supreme Court of the United States in the case, already cited, of *Phoenix Ins. Co. v. Erie Transportation Co.* (1886), 117 U. S. 312; s. c., 25 AMER. LAW REG. 330, have adopted and followed the rule stated in the foregoing decisions. The reasons for so doing are thus clearly given in the opinion of GRAY, J.: "The insurer stands in no relation of contract or of privity with such persons (*i.e.*, the carriers). His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In a court of common law, it can only be asserted in his own name, and, even in a court of equity or of admiralty, it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured * * *. The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured had, it follows that, if the assured has no such right of action, none passes to the insurer; and that, if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions." The doctrine of this case was recognized very recently in *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.* (1889), 129 U. S. 397.

The latest consideration of the question, with the exception of the principal case, was by the Court of Appeals of New York in *Platt v. Richmond, Y.*

R. & C. R. R. Co. (1888), 108 N. Y. 358. The Court there expressly adopt the reasoning of Justice GRAY, just quoted. It may, therefore, be now regarded as settled law, that a stipulation, giving a common carrier the benefit of the shipper's insurance, is valid, and that such a stipulation will operate to defeat any claim to damages on the part of the insurer, either by right of subrogation or by express assignment, for the reason that the insurer, in either case, takes only the rights of the insured, subject to all his lawful engagements and the limitations and restrictions of his contract.

In *The Sidney* (U. S. C. Ct., S. D. N. Y., 1885), 23 Fed. Repr. 88, it was held, that it was not even necessary that the stipulation should be inserted in the bill of lading, but that it would "be equally valid when clearly proved to exist by extrinsic evidence." This case is cited with apparent approval in *Phenix Ins. Co. v. Erie Transportation Co.*, *supra*.

The existence of such a stipulation in the bill of lading will not, however, operate as a defense to an action by the owner, when it does not appear that he has actually realized anything from his insurance: *Inman v. South Carolina Ry. Co.* (1889), 129 U. S. 128.

4. *Effect of warranty that the insurance shall not inure to the benefit of any carrier.*—From the foregoing review of the course of the decisions, it will be seen that a common carrier is now able to entirely defeat the insurer's right of subrogation, by the insertion in its bill of lading of a stipulation giving it the benefit of the insurance. The practical operation of this principle imposes upon the insurer the payment of all losses by fire, suffered by goods in course of transportation, and the carrier is protected, to the extent of the insurance, without having made any contract with the insurer or paid any

premium for the policy. To restore themselves to the position which they occupied before such stipulations had been devised, insurance companies have inserted in their policies warranties that the insurance shall not inure to the benefit of any carrier. The validity and effect of such a warranty were considered in the principal case, where the question appears to have directly arisen for the first time. The principles involved have, however, been several times the subjects of adjudication.

In the case of *Carstairs v. Mechanics' and Traders' Ins. Co.* (U. S. C. Ct., D. Md., 1883), 18 Fed. Repr. 473, there was a stipulation in the policy that the insurer, in case of loss, should be subrogated to all claims against the transporter of the merchandise insured. The insured contracted to give the carrier the benefit of the insurance. The goods were lost while in transit and the insurance company defended to the claim of the insured, on the ground that by his contract with the carrier he had defeated the right of subrogation, and rendered impossible the performance of the stipulation in his policy. The Court (MORRIS, J.) sustained this position, saying: "If the plaintiffs should recover in this suit compensation from the insurance company, the agreement in the bill of lading, if valid, has made it impossible for them to do what, by both the printed and the written clauses of the policy, they agreed to do, namely, to subrogate the insurance company to their claim against the carrier. They have, in effect, agreed with the insurance company to subrogate it to their claim against the railroad, and have also agreed with the railroad to subrogate it to any claim they may have against the insurance company * * *. The insurance company, being practically in the position of a surety, and having a right to the subrogation, and the plaintiffs having, by the terms of the bill of lad-

ing under which they claim the goods, defeated that right, they cannot be allowed to recover in this action."

The same question was involved in the case of *Inman v. South Carolina Ry. Co.* (1889), 129 U. S. 128, which was an action by the shipper against the carrier to recover for goods lost by fire, while in course of transportation. The carrier alleged, in defence, that it had not received the benefit of the plaintiff's insurance on the goods, as stipulated in the bill of lading. It appeared that none of the insurance had been paid by the companies, and that all the policies provided for the transfer of the owner's claim against the carrier to the insurer on payment of the loss, and that some of them contained further provisions forfeiting the insurance, in case any agreement was made by the insured whereby the insurer's right to recover from the carrier was released or lost. It was held by FULLER, C. J., that the insured could have recovered upon his policies only "upon condition of resort over against the carrier, any act of the owner's to defeat which operated to cancel the liability of the insurers; they (the policies) could not, therefore, be made available for the benefit of the carrier."

The principle of these cases was again recognized in *Phenix Ins. Co. v. Parsons* (1889), 56 N. Y. Super. Ct. 423, an action upon a policy of marine insurance.

In two recent decisions of the Supreme Court of Pennsylvania, the effect of stipulations requiring the assignment to the insurer of the insured's cause of action, is strikingly illustrated. A trustee had procured insurance upon a building belonging to the trust estate in two different companies. One policy provided that, "when this company shall claim that the fire was caused by an act or omission of any person, town or corporation, which created a cause

of action, the party to whom the loss is payable under this policy, shall, on receiving payment, assign to this company such cause of action." The other contained no such provision. The property insured was damaged by fire, originating from a gas explosion, which was chargeable to the negligence of the gas company, giving the owner a right of action against the latter. Before payment upon the policies, the owner settled with and released the gas company from all claims arising out of the explosion, the release stipulating that it was not to affect the claims of the owner against the insurance companies. He then brought suit upon his policies. It was held, in the case of the policy which contained the condition requiring an assignment of the insured's cause of action, the opinion being by WILLIAMS, J., that the release of the gas company, which made "performance of the covenant to assign either impossible or useless, would relieve the insurance company of its concurrent covenant to pay:" *Niagara Fire Ins. Co. v. Fidelity Title and Trust Co.* (1889), 123 Pa. 516. On the other hand, where there was no express covenant to assign, the mere existence of the equitable right of subrogation would give the insurer no claim to substitution until the liability had been discharged. Therefore, in the latter case, the release of the wrong-doer would not constitute a defense to the claim of the insured upon his policy: *Ins. Co. of North America v. Easton* (1889), 123 Pa. 523.

The authorities cited appear to establish the doctrine that, where the owner of goods in transit contracts both to give the carrier the benefit of his insurance and also to assign to the insurer his cause of action against the carrier, he forfeits all claim upon his policy, but may still recover against the carrier. The principal case extends this doctrine to policies in which it is warranted that

the insurance shall not inure to the benefit of any carrier. In either case the carrier may, of course, be protected by taking out a policy directly upon its own interest in the goods.

It will be noticed that the policy in the principal case, antedated the contract of carriage. Whether a similar warranty, in a policy issued subsequently to the date of the bill of lading, would have the same force, yet remains to be decided. The principles laid down in the various decisions here considered, would seem, however, to require an affirmative answer to this question.

A novel question, involving some of the subjects under discussion, arose in *Kidd v. Greenwich Ins. Co.*, C. Ct. U. S., S. D. N. Y. (1888), 35 Fed. Repr. 351. The insurance was upon certain barrels of spirits and covered the excess of value above \$20 per barrel, less a stipulated amount to be deducted in lieu of average. The policy provided that the insured, by accepting payment, would assign and transfer to the insurer all his claim, by reason of the loss, against the carrier or others, to the extent of the amount paid him, and that any act of the insured, waiving or tending to defeat or decrease any such claim, whether before or after the insurance, would operate to cancel the policy.

The insurer entered into an agreement with the carrier that the spirits should be carried at a stipulated valuation of \$20 per barrel, the actual value being over \$97. The goods were burned while in transit, and the owner received from the carrier payment at the rate of \$20 per barrel. He then brought suit against the insurance company for his loss in excess of that amount. Defense was made on the ground that, under the provisions of the policy which have been cited, the agreement to restrict the carrier's liability rendered the contract of insurance void. But the Court (WHEELER, J.) held that these provisions of the policy did not mean "that all liability of the carrier, which might arise, shall be insisted upon and created and not diminished from what it would be without special contract, but that the claim against the carrier, as it actually exists in favor of the insured, shall not be waived or diminished, and shall inure to the benefit of the insurer. The policy does not provide that any liability of the carrier shall be perfected, but that, if one is perfected, it shall remain for the benefit of the insurer." Recovery was, therefore, allowed. In view of the later decisions, cited above, the soundness of this rule must be considered doubtful.

JAMES C. SELLERS.

Supreme Court of Michigan.

BURTON v. TUIITE.

A statute declared that the custodians of municipal records should furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, to all persons having occasion to examine them for any lawful purpose, and also for making memoranda or transcripts therefrom during business hours. *Held*, that under this statute, a person making and dealing in abstracts of title has the right to examine the tax sales books in the city treasurer's office.

The receiver of taxes in Detroit makes up an annual statement of his sales for unpaid taxes and delivers it to the city treasurer, who notes therein such redemptions as may be made, or the sale of any tax-bids. This statement is not one that

is required by law. *Held*, that it is nevertheless a public record, and therefore open to public inspection by citizens.

A public municipal corporation, like a city, can have no private books, not even of accounts, that are not open to the inspection of its citizens.

The doings of a municipal corporation, and the doings of its officers, and the records and files in their offices, must be open to public inspection by its citizens, without charge.

It has never been a common law rule in the United States, that the public had no right of free access to the public records, and to the public inspection thereof. And no special interest in the subject-matter of the record need be shown, to entitle one to such right.

A statute which confers a right upon "all persons," confers it upon any person. *Webber v. Townley*, 43 Mich. 534, overruled.

A public officer has no exclusive right, as against other citizens, to search the records in his charge; and he has no right to exact fees for searches made, unless they are made by himself or his subordinates.

Henry A. Chaney (*Hoyt Post* with him), for relator.

John W. McGrath and *Edward Minock* for respondent.

MORSE, J., December 28, 1889. The relator asks for the writ of mandamus, to compel the respondent to permit him to inspect and examine the records and files in the City Treasurer's office at Detroit, and to furnish proper and reasonable facilities for such inspection and examination, and for making memoranda and transcripts from such files and records, in compliance with Act No. 205 of the Public Acts of 1889.

The Act in question reads as follows—

"That the officers having the custody of any county, city or town records in this State, shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda or transcripts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose. *Provided*, That the custodian of said records and files may make such reasonable rules and regulations, with reference to the inspection and examination of them, as shall be necessary for the protection of said records and files, and to prevent the interference with the regular discharge of the duties of such officer. *And provided further*, That such officer shall prohibit the use of pen and ink, in making copies or notes of records and files:" Public Acts of 1889, p. 286.

Relator shows in his petition that he is engaged in the abstract business in the city of Detroit, and has invested a large sum of money in said business; that his business requires that he should know what taxes, levied by the city of Detroit, are liens upon property of which he is furnishing abstracts, and by

whom such liens, if any, are held ; that when lands are sold for unpaid taxes, the sale is conducted by the receiver of taxes. A statement of such sales, in book form, is made by the receiver and turned over to the City Treasurer, in whose custody it thereafter remains. When sales are redeemed or city bids sold, such redemption is minuted in this book. That it is necessary in said relator's business to frequently consult this book. If proper facilities were granted him, he would not need to consult the same more than ten minutes in any one day. That the prevailing rule and custom is, in all the city and county offices, to permit all persons to have free access to the records therein, and he himself has ordinarily been allowed this privilege, without obstruction or restraint, except in the case of the respondent, who is City Treasurer of the city of Detroit.

That said respondent has frequently refused to permit relator to inspect the sales books above referred to, as have also his subordinates ; and, if at times, an inspection of such records has been granted, it has always been accompanied with insulting language, implying that relator was taking time which belonged to the public, and that he must hurry, or that the books would be taken from him ; and this, too, although no other parties were present to be waited upon or attended to, and though much more time was consumed by said treasurer in making such complaints than would be necessary for relator to inspect and make such memoranda as he needed, if he could have access to the records without unreasonable interruption. A clerk would be detailed to see that the relator did not mutilate the records, with instructions not to permit relator to take the books. But more frequently relator has been told by the said city treasurer and his subordinates, that he could not see the records. Respondent has followed this obstructive course for a long time, to the great annoyance and discomfort of relator, and in the face of the fact that there was posted in his office a notice to the effect that *all* information desired by the public would be cheerfully and promptly furnished. That respondent at one time informed relator that it was a matter of money with him, and that if relator would pay him twenty-five dollars per month, relator could have what access he pleased to the records in said treasurer's office.

July 2, 1889, relator called at the treasurer's office at about eleven o'clock, A. M., and requested the privilege of inspecting some of the sales books. Respondent asked if the information wanted was for relator's private business. Relator replied that Richard M. Coon was the owner of lot 24, in Wesson's section of the Thompson farm, in the city of Detroit, and that he had employed relator to see if certain tax sales, which had been previously made, were still held by the city, or disposed of, and if disposed of, to whom. Respondent requested relator to write out what he wanted on a piece of paper, which he did. The paper was handed to a clerk who was called by the respondent to wait on relator. The parcel of land had been sold in six successive years, and it became necessary to inspect six different sales books. That the statement which relator had made for the clerk, a copy of which he retained, informed the clerk the number of the book required, the page of the book and the line on the page which he desired to inspect. That said clerk produced four of the books required, and they were hastily inspected by relator, but he was not permitted to handle them.

During the examination, which could hardly have occupied ten minutes, respondent himself sat by, discussing the general subject of relator's rights, and apparently in no wise hurried by pressure of official duties. That after relator had inspected the fourth volume, said clerk,—taking his cue from the language and actions of his employer, said respondent—abruptly, violently and unreasonably refused to produce the other two books requested, and left the room. That relator then asked the City Treasurer himself to produce the two books asked for, but said treasurer refused. Relator then told respondent that he would get the books himself, if he, respondent, would permit him, relator, to go into the room where said books were, for that purpose. Respondent told him he could not go into that room, and absolutely refused to permit him to see the books he desired. Relator offered respondent ten dollars per month to be accorded such treatment as is accorded to the public. Respondent refused the offer. Relator then formally demanded the right to inspect the two books he had asked for before, and reminded respondent of the Statute. Relator said

that if he could not see the books, he should ask for a mandamus. Respondent told him to "mandam," if he wanted to; that the books were in the vault, and relator could not see them, and that nothing but an order from the Common Council would make him remove them. He told relator to leave a written memorandum of what he wanted, and relator refused to do this, as he had already furnished respondent with one statement of what he required. Respondent became vociferous, declaring that he had disposed of the subject, refused to hear anything further, and left the room. Relator then, under the advice of counsel, made a new memorandum of what he wanted and offered it to the Deputy Treasurer, who said he had no time to attend to it. Relator told him he need not attend to it then, as he would send his clerk for it, laid the memorandum on the table, and placed a paper-weight upon it. Respondent came in about then, in a high temper, and with some profanity, ordered the relator out of the office, which order relator obeyed. During the whole time of this interview, there was no other person in the office on business, unless he was secluded in the private office of respondent.

The respondent, in his answer, denies that the books referred to by relator are public records, or that they are made so by charter, ordinance or law, or that they are required by law to be kept, or that relator or any person, except respondent, is entitled to the possession of said books, or entitled to take them out of the custody of respondent, or to make extracts from them, except under the immediate supervision of respondent. He denies that it is the universal practice in city offices to permit all persons desiring to inspect the said books to have free access to them, or that such is the usage, or that such usage has become so well established as to have the force of a common law custom. He denies that relator has been ordinarily allowed to inspect such books without obstruction or restraint, if by obstruction and restraint is meant a denial of the right of access to said books without the supervision of the city treasurer. He denies that the right which relator seeks to establish is recognized or confirmed by any act of the Legislature. He denies that at any time this respondent, or by this respondent's direction or authority, any deputy or clerk

in respondent's office has accompanied any inspection of the books which relator has been allowed to make, with insulting language. He denies that relator has been told by respondent that he, the relator, could not see the records. He denies that respondent has been guilty of obstructing relator. He denies that respondent derives an income from abstracts amounting to one thousand dollars per annum, or any such sum. He denies that this respondent has ever said, that if relator would pay respondent twenty-five dollars per month during his term of office, the relator could have whatever access he desired to the books in respondent's office. He denies that he made use of the profane expression alleged by relator.

Respondent also sets forth in his answer, that relator is seeking the information from the books as a matter of merchandise to sell to others. That up to July 2, 1884, abstracts could only be procured of the city treasurer, and that the treasurer whose office expired in 1884, realized from fifteen hundred to two thousand dollars annually from tax abstracts, and that he is informed relator paid such officer for the privilege of making a copy of the books of said office, and did make and use the same for private gain. That for one year prior to July 1, 1888, relator paid thirty-five dollars per month for this privilege. That respondent has always been ready and willing to give any lot-owner or citizen desiring it, information as to tax charges upon lands, and has always done so free of charge. He insists that he has the legal right to charge a small fee for making out abstracts, as there is no law requiring him to make them otherwise. That the books in question have been kept for the information and convenience of the city of Detroit, and are not required to be kept by the city charter or any law or ordinance.

That each year, after the Receiver of Taxes makes sale of lands for unpaid taxes, one of said books is made up by such Receiver, and entered therein is the name of the owner, if known; a description of each parcel of land; the amount of the city tax, school tax, etc.; the total tax; the name of the person to whom sold, which is usually the city of Detroit; and said books also contain blanks for entry of assignment or redemption; that there are in all thirty-seven books, con-

taining from one hundred to two hundred and fifty pages each. In addition, there are some sales books, containing memoranda of sales for unpaid special assessments. There are also sixteen (one for each ward) indexes to sales books, each of which contains a description of each parcel of land in that ward, with a column for each year, in which to enter, if sold, the number of the page of the sales book for that year containing the memoranda of the sale. If a sale has been cancelled, a red ink line is drawn through the reference figures; that the books so kept are easily subject to alteration or defacement.

That the books aforesaid are valuable, and the loss of the same, or any of the same, would be irreparable; that respondent is charged by the city with the care and custody of the same; that a portion of respondent's office is kept for the use of the public, and the public is necessarily, by means of desks, railings and wire work partitions, excluded from the private or working department of the office, and from the part containing the moneys, books and papers in respondent's office; that relator, in order to use the right which he here seeks to establish, must necessarily be admitted to that portion of respondent's office from which the general public is excluded; that the books referred to are kept by respondent in a vault in the City Treasurer's office, and in the same vault are other valuable books and papers, together with large sums of the city moneys, varying in amount from one hundred dollars to thirty thousand dollars; that to produce said books, and a number of them, as is often required by relator, requires a large amount of time almost daily, and from ten to thirty minutes per day have often been consumed in so doing; that respondent insists that it is the duty of respondent, in order to protect himself and his bondsmen, to keep their books under the immediate care, custody and supervision of himself or one of his trusted employees; that during the month of July, relator's purpose is not so much to look after individual cases of sales as it is to compare his minutes of sale with the office memorandum of the same. Respondent submits that he is not obliged to produce the books of his office, and supervise the inspection of the same, to one who is collecting information for merchandise, and that if he does do so, he is entitled to pay for it.

He also submits, that in other public offices—in the office of the Register of Deeds, in the Probate Court, and in the County Clerk's office—when information is furnished, which the law does not require to be furnished, charges are made, and legitimately, for such information. He also shows that he has given bond for the safe keeping of these records; that his total fees for abstracts for eleven months, ending December 31, 1888, were but two hundred and forty-three dollars. And he finally submits, that relator is not entitled to access to the books of respondent's office at his own pleasure; neither is he entitled to frequent, or enter into, that portion of respondent's office from which the general public is excluded; that respondent is entitled to supervise the examination of the books in his office, and that the relator, as a dealer in information, is not entitled to compel respondent to give his time to relator, at the pleasure of relator, for his gain and without compensation to respondent.

It is evident, from the petition and answer, that there is more or less of ill-feeling between these parties; and it is also clear that the relator has been, in fact, denied free access to these sales books, and that the respondent does not propose to permit such access unless he is paid therefor; nor does he propose to furnish any facilities, reasonable or otherwise, to the relator to inspect and examine said books, without pay.

This right of relator, claimed under the Statute, is denied, *first*, on the ground that these books are not public records, because there is no express statutory provision, anywhere, that such books shall be kept.

These books are made up, in the first place, by the Receiver of Taxes, and by him handed over to the City Treasurer. They are, therefore, books used and kept in two of the public offices in the city of Detroit, and they must be considered public records. The claim that they are private books of account is absurd. They are neither the private books of the Receiver of Taxes nor of the City Treasurer, and the city of Detroit, a public municipal corporation, can have no private books, not even of accounts, not open to the inspection of its citizens. Its doings, and the doings of its officers, and the records and files in their offices, must be open to the public,

nor can fees be charged for such inspection to those having the right to examine and inspect such files and records.

But the broad ground is also taken that the relator has no lawful right to inspect these sales books without recompense to the respondent, because he is an abstract maker, and his business may be, and is, in most cases, to sell to some person the information gained by such examination; that he does not come under the statute, because he does not have "occasion to make examinations of them for a lawful purpose;" and that this case is covered, and against relator, by two former decisions of this Court: *Webber v. Townley* (1880), 43 Mich. 534; *Diamond Match Co. v. Powers* (1883), 51 Id. 145.

If I understand the latter case, the writ of mandamus was denied because the Diamond Match Company was not a citizen, nor an inhabitant, nor even a domestic corporation. It did not show its charter, nor give any evidence of its powers or artificial capabilities. This Court say:

"We have no reason of knowing that it has capacity to buy lands, or hold them, or deal in titles anywhere, or to carry on the business in which its petition alleges it to be engaged; or to apply itself to such an enterprise as making a system of abstracts of all the titles of all the real property in a county. The case is bare of information in regard to the true legal status of the relator, and as to whether it is other than a mere intruder in what it demands."

The petition of the relator alleged that it was incorporated under the laws of the State of Delaware; that it had become the purchaser of about thirty thousand acres of pine land in the county of Ontonagon, had erected extensive saw mills and invested nearly two hundred thousand dollars, and was cutting large quantities of pine and constantly purchasing more land, and to provide against acquiring defective titles, desired to protect its rights and interests by providing for itself an abstract of all the lands in the county. The relator was permitted opportunity to examine and make abstracts as far as its own ownership or interest was concerned, present or prospective, but the dispute was whether it had the right to go further and insist on having office accommodations and the handling of all the records, to make an abstract of title to all the lands in the county. While the writer of the opinion, Chief Justice GRAVES, paused to make some practical suggestions of obsta-

cles in the way of proper relief being afforded by mandamus, the ground of the denial of the writ was that the relator had failed to show any title to the right it claimed, because the authority given to it by the State by which it was created was not disclosed, and could not be assumed. See *Diamond Match Co. v. Powers* (1883), 51 Mich., at pages 147, 148. In the view of the case above cited, I do not think that it is any authority bearing against the relator's claim in this case.

And I cannot agree with the opinion of this Court, or the reasons given for it, in *Webber v. Townley*, *supra*. Nor do I anticipate that hardly any, if any, of the results imagined by the writer of that opinion, would ever occur, if the holding were otherwise. If any of them should happen, the law is powerful enough to remedy them, and "Sufficient unto the day is the evil thereof."

I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to and public inspection of public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides, that before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it, or intend ever to have. I also have the right to examine any title that I see fit, recorded in the public offices, for purposes of selling such information, if I desire. No one has ever disputed the right of a lawyer to enter the register's office and examine the title of his client to land as recorded, or the title of the opponent of his client, and to charge his client for the information so obtained. This is done for private gain as a part of the lawyer's daily business, and by means of which, with other labors, he earns his bread. Upon what different footing can an abstractor—can Mr. Burton—be placed within the law, without giving a privilege to one man, or class of men, that is denied to another?

The relator's business is that of making abstracts of title and furnishing the same to those wanting them, for a compensation. In such a business it is necessary for him to consult and

make memoranda of the contents of these books. His business is a lawful one, the same as is the lawyer's, and why has he not the right to inspect and examine public records in his business as well as any other person? If he is shut out because he uses his information for private gain, how will it be with the dealer in real estate, who examines the records before he buys or sells, and buys and sells for private gain? Any holding that shuts out Mr. Burton from the inspection of these records, for this reason also shuts out every other person, except the buyer, seller, or holder of a particular lot of lands, or one having a lien upon it, or an agent of one of them, acting as such agent without fee or reward. It cannot be inferred that the Legislature intended that this statute should apply only to a particular class of persons, as, for instance, those only who are interested in a particular piece of land. "Any person" means all persons.

I can see no danger of great abuses, or inconveniences, likely to arise from the right to inspect, examine, or make note of public records, even if such right be granted to those who get their living by selling the information thus gained. The inconvenience to the office is guarded against by the statute, which authorizes the incumbent to make reasonable rules and regulations with reference to the inspection. And when abuses are shown, there will no doubt be found by the Legislature, or the courts, a remedy for them.

It is plain to me that the Legislature intended to assert the right of all citizens, in the pursuit of a lawful business, to make such examination of the public records in public offices as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper under the circumstances.

The respondent in this case is the lawful custodian of these sales books, and is responsible for their safe keeping. And he may make and enforce proper regulations, consistent with the public right, for the use of them. But they are public property, for public use, and he has no lawful authority to exclude any of the public from access to and examination and inspection thereof at proper seasons. It follows that he has no right to demand any fee or compensation for the privilege of access

to the records, or for any examination thereof, not made by himself or his clerks or deputies. He has no exclusive right to search the records, as against any other citizen: *Lum v. McCarty* (1877), 39 N. J. L. 287; *Boylan v. Warren* (1888), 39 Kan. 301; *Cole v. Rachac* (1887), 37 Minn. 372; *German Loan and Trust Co. v. Richards* (1885), 99 N. Y. 620; *Hanson v. Eichstaedt* (1887), 69 Wis. 538.

It follows, in my opinion, that the prayer of the petitioner must be granted, and the writ issue as prayed, the relator asking in this writ no more than the statute gives him.

CHAMPLIN, J., concurred.

CAMPBELL, J.: I think relator has such an interest as entitles him, under the law of 1889, to see the book in question, and confine my opinion to that point.

SHERWOOD, C. J., and LONG, J., did not sit in this case.

This annotation is confined to a discussion of the statutes, and decisions thereunder, of the various States, where abstract companies and private persons have sought the free and constant use of the public records, in the course of compiling and keeping up, for profit, a statement of all the titles to land, in a city, township, county, or other local division of a State: that is—

Alabama, pp. 64, 66.

Colorado, p. 67.

Georgia, pp. 64, 67, 68.

Kansas, pp. 63, 66.

Michigan, pp. 49, 65, 67.

Minnesota, p. 62.

New Jersey, pp. 60, 65, 67.

New York, p. 66.

Pennsylvania, p. 65.

Wisconsin, pp. 61, 68.

The public nature of the public records of private documents was well explained in one of the decisions cited in the principal case. "The [county] clerk is the lawful custodian of the records, and indexes thereto, and is responsible for the safe keeping thereof. His powers over them are such as are necessary for their protection and pres-

ervation. To that end, he may make and enforce proper regulations, consistent with the public right, for the use of them. But they are public property, for public use, and he has no lawful authority to exclude any of the public from access to, and inspection and examination thereof, at proper seasons, and on proper application. The clauses which declare the public right in this behalf, employ the most comprehensive and general language: 'All persons desiring to examine the same,' 'Every person shall have access,' etc. It follows that the clerk has no right to demand any fee for the privilege of access to the records and indexes, or for any examination thereof, not made by himself or his assistants. He has no exclusive right to search the records:" RUNYON, C., *Lum v. McCarty* (1877), 39 N. J. Law 287, 290. The party refused was an attorney, not engaged in abstracting, and had been refused access to the records until he paid, under protest, the fees chargeable if the clerk had made the search. This suit was to recover the sum paid, and was successful.

The New Jersey Statute, under which

the foregoing case was decided, provide (Revision of 1877, p. 157)—“ 25. That the clerk of the Court of Common Pleas of the county shall record, in large, well-bound books of good paper, to be provided for that purpose and carefully preserved, all deeds and conveyances of lands, tenements and hereditaments, lying and being in the said county, acknowledged or proved, and certified to have been acknowledged or proved in manner aforesaid, which shall be delivered to him to be recorded; and, also, all other instruments which are by this Act directed therein to be recorded; to which books every person shall have access at proper seasons, and be entitled to transcripts from the same, on paying the fees allowed by law.”

And (Id. 705)—“ 17. The clerk of the Court of Common Pleas of every county of this State shall, from time to time, provide fit books, well bound and lettered, for registering all mortgages and defeasible deeds in the nature of mortgages, of lands, tenements and hereditaments, lying and being within his county, in which shall be entered the names of the mortgagor and mortgagee, the date of the mortgage, the mortgage money and when payable, and the description and boundaries of the lands, tenements, and hereditaments, mortgaged; that the said clerk shall, immediately on receiving the said mortgage, make the said entry or abstract in the register, and shall note in the margin, or at the foot of such abstract, the day of the month and the year when the said mortgage was delivered to him or brought to his office to be recorded; to which book every person shall have access at proper seasons, and may search the same, paying the fees allowed by law.”

Another of the citations in the principal case, would seem to indicate that at least one public officer was made to feel his duty, first, by the action of the individual, and then, by the denial of

an injunction to restrain the abstractor: *Hanson v. Eichstaedt* (1887), 69 Wis. 538.

The Revised Statutes of Wisconsin (chap. 37, p. 247,) provide—“ SECTION 700. Every sheriff, clerk of the circuit court, register of deeds, county treasurer and county clerk, shall keep his office at the county seat, and in the office provided by the county or by special provisions of law; if there be none such, then at such place as the county board shall direct; and shall keep such office open during the usual business hours each day, Sundays and legal holidays excepted; and with proper care, shall open to the examination of any person, all books and papers required to be kept in his office, and permit any person so examining, to take notes and copies of such books, records or papers, or minutes therefrom; and if any such officer shall neglect or refuse to comply with any of the provisions of this section, he shall forfeit five dollars for every day such noncompliance shall continue. Actions for the collection of the forfeiture herein provided, may be brought in all cases of such refusal or neglect, in the manner provided by law, upon the complaint of the district attorney of the proper county, or of any party aggrieved by such neglect or refusal.”

Commenting on this section, CASSODAY, J., said—“ This language, literally construed, certainly includes the defendant. The words ‘any persons,’ when so construed, are distributive, and include every person. By what authority, then, are we to construe these words as only applicable to a particular class of persons, as, for instance, those only who are interested in the particular piece of land, the record of which is sought to be inspected or copied? If so, how is the fact of such interest to be determined—by the applicant, or by the register? Is the register to accept, without question, the statement of the

applicant, or may he require other evidence? Of course, every statute is to be construed with reference to its object and subject-matter; and in that way, it frequently occurs that general words are limited in their operation: Wilb. Stat. Laws, 173-177. Here the subject-matter is the examination of the public books and records in the register's office, and the taking of notes, minutes, and copies therefrom; and the statute requires the register, under a penalty, to permit any person to so examine and take notes, minutes and copies. Under such a statute, can we say that when a respectable person, in a respectful manner, applies to the register to make such examination, etc., he is to be excluded, merely because he does not belong to some class of persons unnamed or undefined in the statute; or, if permission is given, is his examination, etc., to be confined to lands in which he, or his clients, have a present pecuniary interest."

And distinguishing the Alabama and Michigan cases (*infra*, pp. 64, 57), the same judge said—"On the contrary, we must hold that our statute in question extends such right of examination, etc., to 'any person' applying to such custodian of public records in a proper manner; subject, however, to the payment of fees, when allowed, and such reasonable supervision and control by such officer as are essential to the convenient performance of his duties and the current business of the public. It may be that more definite regulations should be made in such matters, but that is a question for the Legislature, and not for us."

Another citation in the principal case is valuable as recognizing the object in view of the Legislature in passing the statute: *State ex rel. v. Rachac* (1887), 37 Minn. 372. Here the Court decided that those who are in the business of making and furnishing abstracts of title

to others for compensation, along with other persons, whether interested in such records or not, all alike, have the right to examine and abstract the records of the register of deeds, in the manner provided by Gen. Stat. 1878, c. 8, § 179, as amended by Laws of 1885, c. 116; that is (Gen. Stat., vol. 2, p. 133)—"§ 179. The register shall exhibit, free of charge, during the hours that his office is, or is required by law to be open, any of the records or papers in his official custody, to the inspection of any person demanding the same, either for examination or for the purpose of making or completing an abstract or transcript therefrom; provided, that whenever, in the opinion of the board of county commissioners, it is for the benefit of the people of their county, that any person, company or corporation, who has or may have a set of abstracts of title, should be permitted to occupy any part of the county building for an office, such board may, by resolution, give such person, company or corporation permission so to do. And in every such case, such board shall require of such person, company or corporation a bond in a sum not less than five hundred dollars, nor more than five thousand dollars, with two or more sureties, to be approved by the commissioners, conditioned that such person, company or corporation will handle all public records belonging to the county with due care, and will not charge any greater fee for making abstracts than is or may be allowed the register of deeds for like services and for the faithful performance of his duties as an abstractor: provided further, that nothing contained in this act shall be construed as giving any person the right to have or use the said record for the purpose of making or completing an abstract or transcript therefrom when it would interfere or hinder the register of deeds in the performance of his official

duties, or as permitting any person to take any of said records from the register of deeds' office without his consent. But no register of deeds is bound to record any deed, mortgage or other instruments unless the fees therefor are tendered him in advance."

Commenting upon the amendatory act, MITCHELL, J., said—"While its operation is not confined to those engaged in the so-called 'abstract business,' yet, in its language and general scope, it shows that these were prominently in the mind of the Legislature. The original statute gave to every one demanding it, the right 'to inspect' these records. But, as there might be doubt what the rights of inspection included, the amendment adds, 'either for examination or for the purpose of making or completing an abstract or transcript therefrom.' As indicating what and whom the Legislature had in mind, the act further provides, that the county commissioners may permit any person having a set of 'abstracts of title' to occupy a part of the county building for an office:" 37 Minn. 374.

Where the question was decided adversely to the right of an abstractor to make copies of the entire records of the office of a register of deeds (*Cormack v. Wolcott*, 1887, 37 Kan. 391), CLOYSTON, C., admitted that the question was an embarrassing one, and that the Court was "not free from doubt. At common law, parties had no vested rights in the examination of a record of title, or other public records, save by some interest in the land or subject of record. So no authorities at common law can throw any light upon this question—the practice of making abstract records being of more recent date:" p. 394. This decision was affirmed in *Boylan v. Warren* (1888), 39 Kan. 301, to the extent that the register of deeds will not be compelled by mandamus to permit any person to make

copies of the entire records in his office, for the purpose of making a set of abstract books for private use or speculation. "The refusal of the officer in charge, to permit a person to gratify a mere idle curiosity, or to examine the records for the mere purpose of taking copies or memoranda thereof, for some supposed possible use in the future, or to examine the records, when they are otherwise rightfully and properly in use by some other person, cannot constitute a basis for any kind of action. Some present and existing right of a person must be infringed to the injury of such person, before any cause of action of any kind can accrue in his favor:" VALENTINE, J., p. 305.

These decisions were based upon Art. 15, c. 25, Comp. Laws of Kansas, 1881, which provide—"SEC. 172. Every county officer shall keep his office at the seat of justice of his county, and in the office provided by the county, if any such has been provided; and if there be none established, then at such place as shall be fixed by special provisions of law; or, if there be no such provisions, then at such place as the board of county commissioners shall direct, and they shall each keep the same open during the usual business hours of each day (Sundays excepted); and all books and papers required to be in their offices, shall be open for the examination of any person; and if any of said officers shall neglect to comply with the provisions of this section, he shall forfeit, for each day he so neglects, the sum of five dollars: *Provided*, That in counties of less than five thousand inhabitants, the probate judge shall not be compelled to keep his office open at the county seat, except at the regular term, except the county commissioners shall so order."

But still, in the latter case (*Boylan v. Warren*), the Court was careful to say: "Before closing this opinion, it

would, perhaps, be proper to state that 'any person,' even an abstractor of titles, who may have sufficient interest in the information to be obtained from the public county records to entitle him to an examination of the same, may, if he chooses, make copies, abstracts, extracts, or memoranda therefrom. There is no statute and no good reason against it:" p. 307.

The same denial of inspection of the records of a probate judge, on the ground that the purpose was speculative, or from idle curiosity, was reached in *Randolph v. The State* (1886), 82 Ala. 527, 529. The relators were abstracters and desired to abstract all the titles to real estate in the county, claiming a right so to do under section 698 of the Code of 1876 (Code of 1887, chap. 5, p. 235)—"791. (698.) The records of the office [of the judge of probate] must be free for the examination of all persons, when not in use by the judge." The same chapter also provides—"789. (695.) It is the duty of the judge of probate,—7. On application of any person, and the payment or tender of the lawful fees, to give transcripts of any paper, or record, required to be kept in his office, properly certified."

In deciding this case of *Randolph v. The State*, the Court felt bound to limit their previous decisions in *Brewer v. Watson* (1882), 71 Ala. 299, and *Phelan v. The State* (1884), 76 Ala. 49; these decisions related to other offices, not open to free statutory examinations. Here the Court thought it expedient to point out that they had not had before them the claim of right to make memoranda, and said: "We must not, however, be understood as intending to abridge the right, conferred by statute, of 'free examination,' by all persons having an interest, of the records of the probate judge's office. Nor will we confine this right to a mere right to inspect. He may make memoranda, or

copies, if he will, and, to this end, may employ an agent or attorney. The limitation is, that he must not obstruct the officers in charge in the performance of their official duties, by withholding records from them when needed for the performance of an official function. Nor is this right of examination confined to persons claiming title, or having a present pecuniary interest in the subject-matter. It will embrace all persons interested, presently or prospectively, in the chain of title, or nature of incumbrance, proposed to be investigated. The right of free examination is the rule, and the inhibition of such privilege, when the purpose is speculative, or from idle curiosity, is the exception:" 82 Ala. 529.

The same sentiments were expressed in *Buck & Spencer v. Collins* (1874), 51 Ga. 391. In this State, the Code provides (ed. 1882, p. 9)—"§ 14. All books kept by any public officer under the laws of this State, shall be subject to the inspection of all the citizens of this State, within office hours, every day, except Sundays and holidays." This was enacted in 1831, long before the days of abstracts and other modern conveniences; and the Court (opinion by MCCAY, J.,) denied the right to make the abstracts, as "a perversion of the purpose for which the books are kept. * * * It is an unnecessary flouting of private matters before the public gaze:" Id. 394.

The absence, at common law, of any general or public right of inspection of public records [1 Greenlf. Ev. §§ 473-5], was also made the foundation of the overruled case of *Webber v. Townley* (*supra*, p. 57), in Michigan. MARSTON, C. J.: "The right to an inspection, and copy, or abstract of, a public record, is not given indiscriminately to each and all who may, from curiosity or otherwise, desire the same, but is limited to those who have some interest therein. What

that interest must be, we are not called upon, in the present case, to determine. The question has usually arisen where the right claimed was to inspect, or obtain a copy, of some particular document, or those relating to a given transaction, or title. We have not been referred to any authority which recognizes the right of a person, under the common law, to a copy, or abstract, of the entire records of a public office, in which [as in this case] he had no special interest, the object in view being simply private gain from the possession and use thereof. The object sought by the relators may be considered as of such modern origin as not to have been contemplated, or covered, by the common law authorities relating to the inspection of public records, and the reason upon which those authorities rest, would exclude relators from the right claimed :” p. 537.

The Court made no citations, but the more important of the citations of counsel may be found in one of them : *State v. Williams* (1879), 41 N. J. Law 332 ; s. c., 19 AMER. LAW REGISTER 154.

As *Webber v. Townley* was decided under the Act, No. 54, approved March 26, 1875 (Laws, p. 51), it is only necessary to add that this Act differs from the Act of 1889 only in the words “ registers of deeds in this State ” throughout the Act, and the use of “ may ” for “ shall ” in the last proviso.

The only reasonable ground for the refusal, by a servant of the people, of public information to any citizen, was expressed by GRAVES, C. J., in the *Diamond Match Co. v. Powers* (*supra*, p. 57)—“ A single consideration of a practical nature may be suggested here. Granting that no other difficulties appear, it seems evident that, in any case where the claim is for a continuous use of the record office and its public contents, from day to day, and week to week, and not merely for a single occasion, with all its material facts defined,

there must be great, if not insuperable, difficulty in enforcing the claim by mandamus. The register [of deeds of the county] has rights and duties which must be respected ; so the general public have rights as well as the claimant ; and the conditions are not steadily the same. They are subject to variation. On every occasion, each must act reasonably, and with proper regard for the rights and duties of the others.”

In the City of Philadelphia, the records of the Recorder of Deeds have been examined three times, and those of the Register of Wills and the Prothonotary of the Courts, twice ; though with much wear upon the books for the time, still, on the whole, with little inconvenience above those inseparable from the use of the record books by a large number of persons at once. This occurred chiefly from a spirit of accommodation shown after the decision by the local Court of Common Pleas (No. 2) in *Comm. ex rel. v. O'Donnell* (1882), 12 W. N. C. (Pa.) 291 ; s. c., 15 Phila. 197, where the Recorder of Deeds refused to a title insurance company immediate information of the filing for record of every deed or writing brought into his office, on the ground that the company used the information to issue certificates of search in rivalry with those issued by the Recorder, and those reducing the aggregate of the fees paid into the city treasury. But the Court awarded a peremptory mandamus. The case turned almost entirely upon the right of the title company, along with other citizens, to purchase a certificate of all deeds and writings filed for record, immediately after their filing. The ordinary certificates of search were usually three or four days behind the legal period of recording..

In the case overruled (*Webber v. Townley*, *supra*, p. 58), MARSTON, C. J., thought that he expressed some other reasons for denying access to the records,

when, conceding to the relators the right to abstract the entire records of a public office, he asserted the same right belonged to all persons, without restriction of residence, "so that the result may be more applicants than the register's office could afford room to. * * * And, as the use of the public records cannot thus be handed over to the indiscriminate use of those not interested in their future preservation, how shall the register protect them from mutilation?" Very much the same sort of language was used by CLOYSTON, C., in *Cormack v. Wolcott* (*supra*, p. 63), and by STONE, C. J., *Phelan v. The State* (1884), 76 Ala. 49, 51.

But such reasons are obviously so in theory only, and were practically answered in the principal case: (*supra*, p. 59), as well as in *The People ex rel. v. Richards* (1885), 99 N. Y. 620, where the register set up that he had given accommodation to three employes of the title company, and had no room for more. The statute of that State provides that such records shall "at all proper times be open for the inspection of any person paying the fees allowed by law" (chap. 410, Act July 1, 1882, § 1759; also §§ 1742, 1747 and 1751). The Court sustained the refusal, saying: "He must transact the current business of the office, and allow all persons reasonable facilities to exercise their rights in his office. * * He must have some right to say how many persons the relator could send there, to work at one time." *EARL, J.*, p. 623.

Commenting upon the Act of 1882, DANIELS, J., declared that "The obligation imposed upon the register, to permit the books, records, and maps of the office to be examined, is absolute in its character. * * * The duty imposed upon him, in this respect, is entirely ministerial, and its observance may be lawfully required through the instrumentality of the writ of *mandamus*. * *

It is not his duty to permit the office to be thronged needlessly with persons examining its books or papers, but it is his duty to regulate, govern and control his office in such a manner as to permit the statutory advantages to be enjoyed by other persons not employed by him as largely and extensively as that consistently can be done. He has no property in these books or papers, but is their mere custodian, whose duty it is securely to preserve and maintain them for the benefit, advantage and convenience of the public. And, in the exercise of his discretion, it should undoubtedly be done with a view to securing these ends. It cannot be made the pretense or excuse for the arbitrary exclusion of any person from his office, whose duties require their services there. What the law expects and requires from him is the exercise of an unbiased and impartial judgment, by which all persons resorting to the office, under legal authority, and conducting themselves in an orderly manner, shall be secured their lawful rights and privileges, and that a corporation formed in the manner in which the relator has been shall be permitted to obtain all the information, either by searches, abstracts, or copies, that the law has entitled it to obtain:" *People ex rel. v. Reilly* (1886), 45 Hun (N. Y.) 429, 434.

The objection arising from a reasonable use of the public records by a number of citizens, was thus effectually answered in a case of a mere citizen and the records of a street commissioner, by BARNARD, J., in *The People v. Cornell* (1866), 47 Barb. (N. Y.) 329, 334: "It would be very inconvenient to allow every citizen that chooses so to do, to come into the office and inspect documents, and make copies of them; and it is suggested that if they be allowed so to do, larger accommodations and larger clerical force would be required. I do not understand that there is any

very serious difficulty in procuring larger accommodations and more clerical force, if that should be found necessary. But this is a mere anticipated difficulty, which I apprehend will not practically occur. If it should occur, I see no difficulty in providing means to remove it."

Contrary to a right of reasonable use of the public records, is *Bean v. The People* (1883), 7 Col. 200. The claim of right to abstract the entire records of a county was denied, though no aid was required from the recorder; "for he is charged by statute with the *safe keeping* and *preservation* of the records, and is responsible for their truthfulness, and freedom from mutilation:" HELM, J., p. 201. Not that the Court insinuated either generic or individual traits of mutilation, because the opinion proceeds: "We think the business of relators [who were abstracters] should be treated as any other legitimate [sic] private enterprise. There is no law to prevent the clerk aiding them, if he chooses so to do, either gratis, or for a stipulated compensation; provided he does not neglect his official duties. But the Court should not, by *mandamus*, compel him to do this against his will:" p. 202. This is the same sort of argument so well answered by the Scripture quotation in the principal case (p. 58, *supra*).

This decision, however, is based upon the interpretation of the General Statutes of the State (chap. xxiii, p. 285, ed. 1883), which provide—"SEC. 667. Every sheriff, county clerk, county treasurer and county judge, shall keep his office at the county seat of his county, and in the office provided by the county, if any such place has been provided; and if there be none established, then at such place as shall be fixed by special provision of law; or, if there be no such provision, then at such place as the board of county commissioners shall direct; and they shall each keep the same open during the

usual business hours of each day, Sundays and legal holidays excepted, and all books and papers required to be in their office, shall be open for the examination of any person; and if any person, or officer, shall neglect to comply with the provisions of this section, he shall forfeit, for each day he so neglects, the sum of five dollars."

The Court said—"We feel confident that an examination of the statute is proper, with the view of determining whether or not the Legislature intended to grant the privilege here claimed." And after stating fear for the integrity of the records, "We are of opinion that the statute in question was not designed to allow individuals who wish to abstract the *entire records*, for future profit in their private business, the privilege of using continuously the public property, and of monopolizing, from day to day, for months and years, a portion of the time and attention of a public officer, against his will, and without recompense. In support of the foregoing reasons and conclusions, see *Buck v. Collins* (*supra*, p. 64), and *Webber v. Townley* (*supra*, p. 58),"—pp. 200, 202.

The same sentiments were expressed by HAINES, J., in deciding *Fleming v. Clerk of Hudson County* (1863), 30 N. J. Law 280, 281; but this was in the Supreme Court, and the Court of Errors and Appeals ruled the other way in *Lum v. McCarty* (*supra*, p. 60).

The same unnecessary fears for the safety of records inspected "under the watchful observation of the clerk," without paying the fees prescribed in the Code, were expressed in *Buck & Spencer v. Collins* (*supra* p. 64). In that State (Georgia), Section 3695 of the Code (ed. 1882, p. 949), prescribes the fees for "exemplification of record * * * for inspection of books, when their [the clerks of the Superior Courts] service is required, * * * for examination

of record and abstract * * ." This part of the fee bill, "by implication, permits any citizen to make an inspection, without fee, if he does not require the clerk's aid: * * * All laws are to be reasonably construed, in view of the object of them, and in view of other laws. The object of this permission to inspect, without fee, if no aid is required from the clerk, is plain. It is contemplated that lawyers, public officers and persons familiar with the books, by having frequent occasion to use them, may not need the clerk's assistance for the purpose. And, by implication, this permission contemplates that the clerk shall, in such cases, make no charge for simply standing by and noticing that no improper interference with the record is had. But there is nothing in this implication (and that is all it is, at best) which authorizes the clerk to permit even an inspection, except in his own presence, or in the presence of his sworn deputy. He is required [Code, ed. 1882, p. 68], section 267 [9], "To keep all the books, papers, dockets and records, belonging to their [his] office, with care and security, * * * ." He cannot do this, if any person may handle or inspect them, otherwise than under his own eye. In our judgment, any clerk would be guilty of a failure in his official duties, should he permit any person, if only for a minute [sic], though he might be familiar with the books, and be able to examine them without the clerk's aid, to have the custody of the books and papers of his office. * * * It is a perversion of the right of inspection,

evidently intended to provide for examinations from time to time, as the ordinary occasions and business of men may require, to make a business of it. The law might well, in view of the ordinary wants of the people, permit an inspection of the books, when no aid is required from the clerk, without a fee. It is but a slight hindrance to him in his duties to keep his eye on the few citizens who visit his office for such purposes, and if he has only to stand by as a sentinel to prevent fraud or spoliation, for a minute or two, it is but a small matter, and may well be without a fee. But the law never contemplated that any person would make a business of it—spend days and weeks in the office engaged in an occupation which, in our judgment, cannot lawfully be carried on except under the immediate observation of the clerk. Fees are given for each inspection, each abstract. The law has in view the inspection of one chain of title—the status of one man—and fixes a fee for that: " 51 Ga. 395, 396.

When *Ream v. People* was cited to the Wisconsin Court, in *Hanson v. Eichstaedt*, a distinction was suggested by CASSIDAY, J. (69 Wis. 541-2), based upon the fee bill of the several clerks and recorders (Gen. Stat. Colorado, p. 268, SEC. 584); hence, the abstracting of the entire records, if permitted would compel the recorder "to aid in building up a rival establishment, which would necessarily reduce the emoluments of his office, and without any statute, in terms, requiring him to do so: " Id. 69 Wis. 542.

JOHN B. UHLE.

ABSTRACTS OF RECENT DECISIONS.

AGENCY.

Authority to sell goods does not, of itself and alone, apparently give to the agent authority to collect the price of such goods. Kane v. Barstow, S. Ct. Kan., Nov. 9, 1889.

ANIMALS.

Cattle running at large on a range, which is common pasturage for everybody, are in the actual possession of no one, and the constructive possession accompanies the title. Budd v. Power, S. Ct. Mont., Oct. 5, 1889.

BANKS AND BANKING.

Exemption of national bank from suit in State courts, except in the county or city where it is located, may be waived by the bank, and it cannot, after submitting to trial in another county, raise the question of jurisdiction and claim the statutory immunity, on writ of error to the State supreme court. First Nat. Bank of Charlotte v. Morgan, S. Ct. U. S., Nov. 11, 1889.

BILLS AND NOTES.

Indorser may maintain an action against the maker of a promissory note for the amount paid to take up such note, and the maker cannot defend on the ground that the payment was made without proper demand and notice; as these are for the benefit of the indorser, he may waive any defects therein. Stanley v. McElrath, S. Ct. Cal., Nov. 27, 1889.

Substitution of new note, made by an indorser for the original note, after it had been dishonored by the maker, the new note being given and accepted in full payment of the other, is such a payment of the latter as will entitle the indorser to maintain an action upon it against the maker. Id.

CHATTEL MORTGAGES.

Mortgagee of a chattel may purchase at a sale under the mortgage, but the burden is upon him to show the fairness of his own sale. Wygal v. Bigelow, S. Ct. Kan., Nov. 9, 1889.

CORPORATIONS.

Misappropriation of corporate funds was constituted where the trustees of a society, incorporated without capital stock "for the purpose of promoting the cause of temperance," under a statute providing for the incorporation of "religious, social, benevolent and learned associations," passed a resolution to sell the property of the society, pay off some outstanding indebtedness, and "purchase other cheaper property suitable for the uses and purposes of the association"; a sale was made, under an order of court, and subsequently a portion of the proceeds was divided among a part of the members, including the trustees, pursuant to a motion "that the association donate to each member in good standing the sum of \$1500, for past services, on signing a receipt for the same," no serv-

ices having been rendered by the persons receiving this money, other than being good and efficient members of the organization ; and any member not a party to the transaction could maintain an action to compel restitution. *Ashton v. Dashaway Asso.*, S. Ct. Cal., Nov. 22, 1889.

Misappropriation of stock by the attorney in fact of a stockholder, who presents the certificate with a power of attorney giving him full authority to deal with the stock, and thereupon obtains a new certificate in his own name, the officers being ignorant of any fraudulent intention on his part, will not render the corporation liable for the conversion of the stock ; and it makes no difference that the attorney was a director of the corporation, nor that the certificate of stock was not indorsed by the owner. *Tafft v. Presidio & Ferries R. R. Co.*, S. Ct. Cal., Oct. 30, 1889.

DAMAGES.

Expected profits are not a proper element of damages in an action for false representations, used as an inducement to the purchase of mining stock ; recovery can be had only for the actual loss sustained. *Smith v. Bolles*, S. Ct. U. S., Nov. 11, 1889.

Liquidated damages will be changed by the waiver of complete, and the acceptance of part performance, of an entire contract, into a penalty, which will entitle the party injured to recover only for the damages actually sustained through a partial breach of the contract. *Wibaux v. Grinnell Live-Stock Co.*, S. Ct. Mont., Oct. 5, 1889.

EMINENT DOMAIN.

Municipal corporation, whose charter contains no provision by which private property can be taken for a public use, has no power to open a street through private lands, and where such power is conferred by the Legislature, provision must be also made for means by which the owner can have his damages assessed by an impartial tribunal, and on his own motion obtain the compensation to which he is entitled ; otherwise he may resist the initial attempt to divest him of his title, and will be sustained by the courts. *State v. City of Perth Amboy*, S. Ct. N. J., Nov. 8, 1889.

GIFTS.

Receipt in full for a bond given by a daughter to her father, payable to his estate one year after his death, was found among his papers by his executor ; the receipt being dated eight years prior to the father's death ; there having been no delivery of the receipt, the daughter was liable upon the bond. *Justice v. Justice's Ex'rs*, Ct. Ch. N. J., Nov. 16, 1889.

Satisfaction of mortgage by a father, payment of which had been assumed by his son, such satisfaction being entered of record two months before the father had executed his will, but no consideration having been paid by the son, will operate to discharge the son's liability, which cannot be reasserted after the death of the father, in the absence of proof of mental incapacity, fraud or undue influence. *Id.*

HUSBAND AND WIFE.

Taxes on wife's real estate, which is occupied by both as a homestead, do not constitute a personal liability of the husband. *Ricks v. Tarr*, S. Ct. Kan., Nov. 9, 1889.

JUDGMENTS.

Enforcement of confessed judgment, which has been entered without a substantial compliance with the statute authorizing such entry, may be enjoined upon principles of equity, at the suit of a third party prejudiced by such judgment. *Schuster v. Rader*, S. Ct. Colo., Nov. 1, 1889.

JURISDICTION.

Forgery of notes, payable at a national bank and made by officers of the bank for the purpose of deceiving the examiner appointed under the United States national banking laws, is not an offense which is triable exclusively in the Federal courts, but may be tried by the courts of the State where the crime is committed. *Cross v. State of North Carolina*, S. Ct. U. S., Nov. 11, 1889.

MORTGAGES.

Mortgage upon homestead and other real estate entitles the mortgagor, as against the mortgagee and all other creditors and lienholders whose rights are not prior or superior to those of the mortgagee, to require in foreclosure proceedings that, before the homestead shall be resorted to for the purpose of satisfying the mortgage debt, all the other mortgaged property shall first be exhausted. *Frick Co. v. Ketels*, S. Ct. Kan., Nov. 9, 1889.

NEGLIGENCE.

Contributory negligence is not chargeable to a pedestrian who, being aware of defects in a sidewalk, abandons it for the roadway, and it is therefore erroneous, in charging a jury who are engaged in the trial of an action against a borough to recover damages for injuries sustained by a foot passenger by falling from such a defective walk, for the Court to say that the roadway was not intended for foot passengers. *Borough of Sandy Lake v. Forker*, S. Ct. Pa., Nov. 4, 1889.

Contributory negligence will be charged to one who, by the invitation of another, and not for compensation, rode with the latter in his wagon, knowing the locality well and knowing also that they were approaching a railroad crossing where a train was about due, but who sat with his back to the driver, as they approached the crossing at a fast trot, and, though he might have seen the danger, did not look, or warn the driver, or ask him to stop and listen, or take any precaution whatever; but the negligence of the driver cannot be imputed to the passenger. *Dean v. Pennsylvania R. R. Co.*, S. Ct. Pa., Nov. 11, 1889.

POST OFFICE.

Payments for expediting mail service, made under a mistake of the Post Office Department as to the additional number of men and animals required, and in ignorance that none were employed, may

be recovered back by the United States Government from the contractors. *U. S. v. Barlow*, S. Ct. U. S., Dec. 2, 1889.

PUBLIC LANDS.

Military land warrant, when located, vests the title at once in the holder and locator, and is payment for the land; having located the same and received the usual certificate, the locator may at once sell and convey the land, and a patent subsequently issued will inure to the benefit of the grantee. *Stinson v. Geer*, S. Ct. Kan., Nov. 9, 1889.

RAILROADS.

Condition on return ticket, requiring it to be stamped and signed at the place of destination before it will be received for return passage, is binding upon the passenger presenting it, and it is immaterial that he failed to read the condition; nor does it alter his position that the baggageman punched the ticket and the gateman admitted him to the train, both without objection, when the ticket expressly provided that no employe of the railroad was authorized to waive any condition of the contract. *Boylan v. Hot Springs R. R. Co.*, S. Ct. U. S., Nov. 11, 1889.

Coupon ticket, sold by a railroad company over its own and connecting lines, which contains a condition, referred to in each coupon, that the company, in issuing the ticket, acted for itself over its own line, and as agent of the connecting lines, but assumed no responsibility beyond its own line, does not render the company issuing the ticket liable for injuries sustained by the holder while riding over one of the connecting lines. *Kerigan v. Southern Pac. R. R. Co.*, S. Ct. Cal., Nov. 22, 1889.

REMOVAL OF CAUSES.

Local prejudice, as a ground for removal, can be sustained only when all the necessary parties to the action on one side are citizens of the State where suit is brought, and all on the other side are citizens of other States, and such citizenship must exist when the action is commenced, as well as when the petition for removal is filed. *Young v. Ewart*, S. Ct. U. S., Dec. 2, 1889.

WILLS.

Contingent remainders are created by a will, in which the testator leaves part of his estate in trust for his daughters during their lifetime, giving them the income only, and provides that upon their death the estate shall descend to and become the property of their child or children respectively, his, her or their heirs, absolutely, with limitations over in case of the death of either of his said daughters without a child or children, or descendants of the same, living, but upon the death of the daughters, the respective remainders will become vested. *Larmour v. Rich*, Ct. App. Md., Nov. 15, 1889.

Devise to wife of one-half "of all my property of which I may die possessed," the remaining one-half to go to his children, gives the wife one-half of the testator's moiety in their community property. *Gilmore's Estate*, S. Ct. Cal., Nov. 21, 1889.

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EQUITABLE EASEMENTS.

The term "equitable easements" indicates a class of property rights, analogous to legal easements, but by reason of either informality in their creation, or the absence of privity of contract or estate, not enforceable in a court of law.

In considering the distinction between legal and equitable easements, it is to be observed that, in most cases, particularly those which relate to real property, courts of equity have generally endeavored that their decisions should bear the strictest possible analogy to the decisions of courts of law in cases of a similar or corresponding impression. In relation to estates and rights in lands, there scarcely is a rule of law or equity of a more ancient origin, or which admits of fewer exceptions, than the rule that equity follows the law, Co. Lit. L. 3, C. 8, sec. 504, n. 16; *Cushing v. Blake*, (1879), 3 Stew. Eq. (N. J.), 695.

An easement is a right without profit, in the land of another. A profit *a prendre*, is a right to take or sever something valuable from the land of another; and this distinguishes it from easements, which are rights merely to use, or interfere with the enjoyment of another's property. In the case of an easement there must be both a dominant and a servient tenement. The benefit must be private, irrevocable, and unattended with direct tangible profit. The burden must be imposed upon corporeal property, not upon the person of the owner, and must be either positively, or consequentially, injurious to its enjoyment. Incident to its existence, are the right of the owner of the

servient tenement to use the *locus in quo*, in every respect not interfering with the easement, and the duty of the owner of the dominant tenement to repair and amend. Such easements are acquired by grant, by prescription, and in rare cases of necessity, by implication of law.

In the case of easements created by covenant, or reservation, the distinction between legal and equitable easements is not always observed. To constitute a grant of an easement at law, it is not necessary that the word "grant" should be used in the deed; it is sufficient if the intention to grant be manifested. An easement cannot strictly be made the subject either of exception or reservation in a deed of conveyance of land, for it is neither parcel of the land granted, nor does it issue out of the land. If, therefore, an easement be incorrectly reserved to the grantor, or excepted from the land conveyed, the reservation or exception operates as a grant of a newly created easement by the grantee of the land to the grantor. *Godd. Eas'mt.* 108. So, an agreement under seal, for the use of a way, or of the water of a stream for the purposes of irrigation, will be construed as a grant of an easement, and not merely as a covenant: *Lord Mountjoy's case* (1584), *Moo.* 174; *Holms v. Seller* (1692), 3 *Lev.* 305; *Northan v. Hurley* (1853), 1 *E. & B.* 665; s. c. 22 *L. J. Q. B.* 183. This subject is discussed in a recent case in Massachusetts, *Hogan v. Barry* (1887), 143 *Mass.* 538. It was an action of tort, for interfering with an easement, which the plaintiff claimed by virtue of the following words, inserted after the description, and before the *habendum*, in the conveyance to him:

"And said grantors agree that no building shall be erected on said lot next east of said granted premises, nearer to the west line of said lot than four feet, being the east line of the premises hereby conveyed."

The grantor owned the adjoining land referred to and subsequently conveyed it to the defendant. The learned judge said:

"If the seeming covenant is for a present enjoyment of a nature recognized by the law as capable of being conveyed and made an easement;—capable, that is to say, of being treated as a *jus in rem*, and as not merely the subject of a personal undertaking;—and if the deed discloses that the covenant is for the benefit of adjoining land conveyed at the same time, the covenant must be construed as a

grant, and in the language of Flowden, 308, 'the phrase of speech amounts to the effect to vest a present property in you.' An easement 'will be created and attached' to the land conveyed, and will pass with it, to assigns, whether mentioned in the grant or not : " *Norcross v. James* (1885), 140 Mass. 188.

Over easements of this class, courts of law and of equity exercise concurrent jurisdiction. An action for damages will lie, or after the establishment of the legal right and the fact of its violation, the complainant will be entitled to a permanent injunction, to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case.

An equitable easement is a right without profit which the owner of land has acquired by contract, or estoppel, to restrict, or regulate, for the benefit of his own property, the use and enjoyment of the land of another : *Whitney v. Union Ry. Co.* (1858), 11 Gray, (Mass.) 359. These rights, as well as the remedies for their enforcement, are purely equitable, and, as has been said, owing either to the informality of the agreement, or the relative situation of the parties, cannot be recognized in a court of law.

In their nature, easements of this class must be restrictive of the ordinary proprietary rights, but their exact scope it is difficult to define. In the most usual cases, they either prohibit, or regulate, the erection of buildings, or prescribe the purposes for which real property shall or shall not be used : *Coles v. Sims* (1854), 5 De G. M. & G. 1; *Western v. Macdermott* (1866), L. R. 1 Eq. 499. Thus, courts of equity will restrain the erection of houses on land agreed to be kept open as a park : *Hills v. Miller* (1832), 3 Paige (N. Y.) 254 ; *Lenning v. The Ocean City Ass'n* (1886), 14 Stew. Eq. (N. J.) 606 ; the erection of buildings above a designated height : *Jeffries v. Jeffries* (1875), 117 Mass. 184 ; *Clark v. Martin* (1865), 49 Pa. 289 ; interference with prospect, by projection of a structure beyond a specified line : *Jenks v. Williams* (1874), 115 Mass. 217 ; will enforce compliance with a uniform building plan : *Trustees of Columbia College v. Lynch* (1877), 70 N. Y. 440 ; will protect the right of passage, light and air, in an open court : *Salisbury v. Andrews* (1880), 128 Mass. 336 ; will enforce a covenant against certain employments on the granted premises : *Whitney v. Union Ry. Co.* (1858), 11 Gray, (Mass.)

359; *Rolls v. Miller* (1884), L. R. 27 Ch. D. 71; *Richards v. Revitt* (1877), L. R. 7 Ch. D. 224; *Portman v. Home Hospital Ass'n* M. R. Dec. 1, 1879, 27 Ch. D. 81 n; or even against nuisances in general: *Barrow v. Richard* (1840), 8 Paige, (N. Y.) 351. In short, the doctrine has been laid down, that any restriction in the manner of using land granted, beneficial to adjacent land of the grantor, not contrary to public policy, may be enforced in equity against the grantee, or his assigns with notice: *Whitney v. Union Ry. Co.* (1858), 11 Gray, (Mass.) 359. In the absence of a legal remedy, relief is granted in equity, to give effect to the intention of the parties to the agreement.

METHODS OF CREATING EQUITABLE EASEMENTS.

The principal difference between a legal and an equitable easement, is in the method of its creation, and the circumstances under which the right can be enforced.

Equitable easements are in general created upon the division and conveyances in severalty of an entire tract to different grantees, and may be by reservation, by condition annexed to the grant, by covenant or by informal agreement: *Trustees of Columbia College v. Lynch* (1877), 70 N. Y. 445.

By Covenant or Reservation.—The enforcement in equity, of easements created by covenant, or reservation, extends to cases where the covenant does not run with the land so as to be enforceable at law. This has been settled only after some conflict of authority. In *Keppell v. Bailey* (1834), 2 M. & K. 517, certain land owners and owners of iron works, and among others, the lessees of the Beaufort Iron Works, formed a joint stock company, and under the provisions of the Monmouthshire Canal Act, constructed a railroad connecting a lime quarry with the several iron works. In the partnership deed of the railroad company, the lessees of the Beaufort Iron Works covenanted for themselves and their successors in interest, to procure all the limestone used in their works from the said quarry, and to convey all such limestone, and also all the iron stone, from the mines to the said works along the said railroad, at a certain designated toll. A bill was filed by the share holders of the railroad to enforce this covenant against

a purchaser of the Beaufort Iron Works with notice of the partnership deed. The injunction was denied, on the ground that the covenant did not run with the land. Lord Chancellor BROUGHAM said—

“ It appears to me very clearly that the covenant does not run with the land, and therefore is not binding upon the assignees of the [covenantors] * * * * . Between the estates of the occupiers of the three iron works, and the estates or the persons of their associates in the railway speculation, with whom they covenant, there is no privity, no connection whatever, of which the law can take notice * * * . There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets; real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed.”

Keppell v. Bailey has been overruled by *Tulk v. Moxhay* (1848), 2 Phil. 774, where the rule as now accepted, was first established. In *Tulk v. Moxhay*, the plaintiff, being the owner in fee of a vacant piece of ground in Leicester Square, as well as of several of the houses forming the square, sold the vacant lot to one Ems in fee, taking in the deed of conveyance a covenant from Ems for himself, his heirs and assigns, with the plaintiff, his heirs, executors and administrators, that the said piece of ground should be kept and maintained in sufficient and proper repair as a pleasure ground, in an open state, uncovered by any buildings, in neat and ornamental order. In granting an injunction to enforce the covenant against a purchaser with notice, Lord Chancellor COTTENHAM used this language—

“ It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken. That the question does not depend upon whether the covenant runs with the land, is

evident from this, that if there were a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

To the same effect, *Bleeker v. Bingham* (1832) 3 Paige (N. Y.) 246; *Barrow v. Richards* (1840), 8 Id. 351; *Coles v. Sims* (1854), 5 De G. M. & G. 1, and cases cited in note (2); *Whitman v. Gibson* (1838), 9 Sim. 196; *Lord Manners v. Johnson* (1875), L. R. 1 Ch. Div. 673; *Earl of Zetland v. Hislop* (1882), L. R. 7 App. Cas. 427; *Gaskin v. Balls* (1879), L. R. 13 Ch. Div. 324; *Trustees, &c., v. Lynch* (1877), 70 N. Y. 440; *Hodge, Ex'r, et al., v. Sloan* (1887), 107 Id. 244; *St. Andrew's Lutheran Church's Appeal* (1871), 67 Pa. 512; *Wilson v. Hart* (1866), L. R. 1 Ch. 463. These covenants may be said to run with the land in equity, though not in law.

An exception to the rule, that the covenant need not run with the land at law, is made in those cases in which the promise under seal calls for the performance of some positive act on the land, either of covenantor or covenantee. Thus in *Austerberry v. The Corporation of Oldham* (1885), L. R. 29 Ch. D. 750, a number of the inhabitants of the borough, being desirous of constructing a new road, executed a deed of settlement, which recited that the making of the proposed new road would be of great public advantage; that the several parties thereto had agreed to form amongst themselves a joint stock company and to raise capital for the purchase of land for the formation of the road and making and maintaining the same, and that certain trustees had been appointed to carry out the work in accordance with a plan therein minutely described. The trustees purchased from one Elliott, the plaintiff's predecessor in title, a strip of land in the line of the proposed turnpike, at the same time covenanting for themselves, their heirs and assigns, that they, or some one of them would, within three years, make and fence off, in a workmanlike manner, the said tract of land into a road, to form part of the road provided for in the deed of settlement, and to form the remainder of said road, which, when completed, should be kept open and maintained by the said trustees for the use of the public, subject to such tolls as should be agreed upon. Under a Borough

Improvement Act, the defendant purchased the said road, gave notice to the plaintiff to repair the portion on which his property fronted, and upon refusal, proceeded to make the repairs itself. An attempt was made to collect the expenses from the plaintiff, who filed a bill praying *inter alia*, an injunction restraining the defendants from further prosecution. The injunction was refused. Lord Justice COTTON said—

“In my opinion, if this is not a covenant running at law, there can be no relief in respect of it in equity; it is not a restrictive covenant; it is not a covenant restraining the corporation, or the trustees, from using the land in any particular way. If either the trustees or the corporation were intending to divert this land from the purpose for which it was conveyed, that is, from its being used as a road or street, that would be a very different question. * * * But here the covenant, which is attempted to be insisted upon, * * is a covenant to lay out money in doing certain work upon this land; and, that being so, * * * it is not a covenant which a court of equity will enforce; it will not enforce a covenant not running at law, when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor, to spend money, and in that way to undertake a burden upon themselves. The covenantor must not use the property for a purpose inconsistent with the use for which it was originally granted; but, * * * a court of equity does not and ought not to enforce a covenant, binding only in equity, in such a way as to require the successors of the covenantor himself,—they having entered into no covenant—to expend sums of money in accordance with what the original covenantor bound himself to do.”

The rule is now firmly established, that the court will not enforce, against the grantee of the covenantor, who has himself entered into no covenant, any covenant of his grantor in relation to the premises conveyed, which does not run with the land and which requires the expenditure of money: *Moreland v. Cook* (1868), L. R. 6 Eq. 252; *Haywood v. Brunswick Building Society* (1881), 8 Q. B. D. 403; *London & Southwestern Railway Company v. Gomm* (1881), L. R. 20 Ch. D. 562.

Huling v. Chester (1885), 19 Mo. App. 607, though an action at law, illustrates the distinction between covenants creating easements and covenants which can only be enforced where there is privity of contract. Huling and W. R. Chester, being the owners of adjoining lots, by agreement under seal, provided for the erection of a line wall by Huling, and for payment for half of such wall by Chester, within six months from the date of the agreement, or at his option, by himself or his grantees, when he or they built upon the premises using the

part of the wall standing thereon. Prior to his death, Huling placed the line wall as agreed, one half on the W. R. Chester lot. C. M. Chester, the defendant, purchased the lot from W. R. Chester, with notice of the contract, and erected a building on the lot, using the party wall. This action was brought by the heirs of Huling to recover the cost of one half of the wall. The court held that the plaintiffs could maintain an action for any interference with their enjoyment of the easement in the party wall, but could not, as owners of the Huling lot, maintain an action for the compensation which was to be paid to Huling personally. The right being personal to Huling, upon his death went to his personal representatives.

There is a class of cases in which equity grants relief by compelling the expenditure of money in the performance of the covenant, but in these cases the remedy is sought against the original covenantor, and relief is granted by way of specific performance, and is regulated by principles affecting that branch of equitable jurisdiction. Of this class of cases, *Randall v. Latham* (1869), 36 Conn. 48, is an example. In that case, the complainant claimed a right, under one Thomas, to the water from a raceway. Thomas and the respondent, Latham, who was the original covenantor, were respectively the owners of mills on the same stream. Thomas conveyed to Latham a tract of land adjoining the mill of the latter. The deed contained a reservation that the grantor should have the privilege of drawing water from the ditch of Latham's mill, and that Latham and his successors should keep a spout ten inches square in the inside at the bottom of the ditch, to which the grantor should at all times have access for the purpose of drawing water. The ditch was never owned by Thomas, and he had no interest in it, beyond that acquired by this provision in his deed to Latham. The Court sustained the complainant's bill, saying—

"The deed purports to require the respondent to put in the spout upon land not conveyed, and the question is whether a court of equity can compel him to do it under the circumstances of the case. That the respondent, by accepting the deed containing the provision, thereby agreed to perform this duty, there can be no doubt. This duty was a part of the consideration of his deed. The respondent has received full compensation, and it is difficult to see why he is not bound to perform it."

In the case of easements created by reservation, courts of equity are more liberal than courts of law. On technical grounds, there is doubt whether at law, a reservation in a deed of conveyance, will create an easement in other lands of the grantee than the lands granted and conveyed to him. In equity there is no embarrassment on this subject. Thus, in *Case v. Haight* (1829), 3 Wend. (N. Y.) 632; s. c. 1 Paige (N. Y.) 447, Schuyler owned the south side of the lower falls in the outlet of Lake George, and also the land under the bed of the stream. Deals and Nichols were the owners of the lands on the north shore, and to them he made a grant of the bed of the stream, reserving to himself, his heirs and assigns, the right to abut any dam, or dams, on both sides or shores of the said waters. An injunction was granted to restrain a breach of the covenant. In construing this reservation, SUTHERLAND, J., said—

“The reservation can have no effect as an exception. * * * * The deed of Schuyler did not convey, or profess to convey, any part of the north shore; he could not therefore reserve a right to build a dam against it. But, though void as an exception, the reservation is binding upon the grantees and their assigns, and becomes operative either as an implied covenant or by way of estoppel. The deed is to be construed as though the parties had mutually covenanted that each should have a right to butt a dam upon the shore of the other.”

By Parol Agreement.—In *Tulk v. Moxhay* (1848), 2 Phil. 774, it was said, that if there was a mere parol agreement, and no covenant, the court would enforce it against a party purchasing with notice, on the ground that if an equity be attached to the property by the owner, no one purchasing with notice of that equity, can stand in a different situation from the party from whom he purchased. The agreement may be either written or oral. Thus, in *Tallmadge v. The East River Bank* (1862), 26 N. Y. 105, the owner of lots on both sides of a city street made a plan exhibiting the street as widened eight feet on each side, and represented to several vendees of different lots that all the buildings to be erected on the lots he had sold and should sell, should stand back eight feet from the line of the street. The vendees erected buildings in conformity with this plan: none of them being restricted by their conveyances or bound by any covenant in respect to the extent or mode of

their occupation. An injunction was granted to restrain a subsequent purchaser of one of the lots, with constructive notice of the facts, from building upon the eight feet adjoining the street. The Court said—

“ From the facts found by the judge at special term, it appears * * * that the strips of eight feet in width on both sides of the street should not be built upon, but kept open. It is to be presumed that they [the purchasers] would not have bought and paid their money except upon this assurance. It is to be presumed that, relying upon this assurance, they paid a larger price for the lots than otherwise they would have paid. Selling and conveying the lots under such circumstances and with such assurances, though verbal, bound Davis [the vendor] in equity and good conscience to use and dispose of all the remaining lots, so that the assurances upon which Maxwell [a purchaser and one of the plaintiffs in the suit] and others had bought their lots, would be kept or fulfilled. This equity attached to the remaining lots, so that any one subsequently purchasing from Davis any one or more of the remaining lots, with notice of the equity as between Davis and Maxwell and others, the prior purchasers, would not stand in a different situation from Davis, but would be bound by that equity.”

To the same effect, *Parker v. Nightingale* (1863), 6 Allen (Mass.) 341; *Newman v. Nellis* (1884) 97 N. Y. 285; *Lenning v. The Ocean City Ass'n* (1886), 14 Stew. Eq. (N. J.) 606. The mere exhibition, however, of a plan, with proposed streets and buildings marked upon it, or representing the land as laid out in a particular manner, will not create a contract, in the absence of any stipulation affecting the course of improvements: *Squire v. Campbell* (1836), 1 Myl. & Cr. 458. The apparent conflict between these cases is explained by difference in the facts involved. In the New York case, the facts found by the judge at special term, and the facts admitted by the pleadings, showed that the lots were bought upon the assurance or agreement of Davis that all the houses on the plan, as shown in the map, were to be set back eight feet from the street. In the English case, the plan was exhibited upon the treaty for a lease. The lease as executed, contained on the margin another plan which did not extend to include that part of the property on which the injunction, if granted, would operate. In the former case, the evidence established a parol contract collateral to the grant; in the latter, the affidavits presented tended to vary the extent and form of the plan as embodied in the lease, and, in that respect, to alter the terms of the written contract.

WHEN, IN FAVOR OF, AND AGAINST WHOM, AN EQUITABLE
EASEMENT WILL BE ENFORCED.

The restriction on the use of the property must not amount to a general restraint of trade; for the law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry or his capital, in any useful undertaking in the kingdom, would be void: *Homer v. Ashford* (1825), 3 Bing. 326; *Brewer v. Marshall* (1868), 4 C. E. Green (N. J.) 537.

The rule as to what will constitute an illegal contract, as laid down in the leading case of *Mitchell v. Reynolds* (1711), 1 P. Wms. 181, is that where the restraint is not general, but partial, and is founded on a valuable consideration, it cannot be said to be an unreasonable restraint; and a restraint preventing a person from carrying on trade within a certain limit of space, though unlimited as to time, may be good, and the limit of space may be according to the nature of the trade: *Catt v. Tourle* (1869), L. R. 4 Ch. App. 654; *Trustees, etc., v. Lynch* (1877), 70 N. Y. 440; *Hodge v. Sloan* (1887), 107 Id. 244; *Wilson v. Hart* (1866), L. R. 1 Ch. App. 463; *Luker v. Dennis* (1877), L. R. 7 Ch. D. 227.

Change in Character of Property.—A court of equity will not enforce a covenant of the character under consideration, where the complainant has caused or permitted a material change in the property, for the benefit of which the scheme of restriction was adopted, nor where, by reason of the altered condition of the property, it would be oppressive to give effect to the covenant or agreement. This question arises in three classes of cases: *first*, where the complainant has himself altered the condition of the property with respect to which the scheme of improvement was devised; *second*, where he has permitted breaches by other covenantors; and, *third*, where the condition of things has been altered by changes referable to the acts of others. Thus, in *Duke of Bedford v. Trustees of the British Museum*, often cited as the British Museum case, (1822), 2 M. & K. 552, the Duke of Bedford, being the owner of all the property in the neighborhood of the British Museum, for the protection of a large part of that property, took a covenant

from the persons to whom he sold or let other parts of the property, restricting them from building otherwise than in a particular way. He afterwards himself built upon a large part of the property which was originally intended not to be built upon. In refusing his application for an injunction to restrain the defendant, being the grantee of the original covenantor, from building in violation of the covenant, the Court said—

“If this deed is permitted to be urged against what I must call, not the legal, but the actual intention of the parties, and if you have the means of obtaining any remedy, you may have recourse to your deed; but you cannot, under such circumstances, come into a court of equity for a remedy which the court never grants, except in cases where it would be strictly equitable to grant it. It is impossible to state as the doctrine of a court of equity, that the court will carry into execution a specific covenant, in all cases where the legal intention of the deed is found. * * * * The question is whether, from the altered state of the property, altered by the acts of the party himself, he has not thereby voluntarily waived and abandoned all that control which was applicable to the property in its former state.”

To the same effect are *Sayres v. Collyer* (1883), L. R. 24 Ch. Div. 180; *Lattimer v. Livermore* (1878), 72 N. Y. 174.

Where the covenant is framed to provide uniformity in the mode of building, so that the enjoyment which springs from regularity in a series of dwelling may be preserved, he who seeks to enforce the covenant, must suffer no such breach of the stipulation by other grantees, as will frustrate all the benefit that would otherwise accrue to the other parties to the agreement. Thus, in *Roper v. Williams* (1822), 1 T. & R. 17, the defendant Williams had conveyed to the plaintiff a piece of ground, being part of a larger tract, covenanting for himself, his heirs, appointees and assigns, that all buildings to be erected on the adjoining land of the grantee should be built in a certain manner. The bill stated that Williams had contracted to sell, and was about to convey to the defendant, Burnand, part of the land belonging to him to the west of the plot conveyed to the plaintiff, without requiring any stipulation that Burnand should refrain from building houses in a manner not conformable to his covenant, and that Burnand had agreed to let the land for the erection of houses not in conformity with the covenant. It appeared by affidavits, that four years previously another grantee of part of the tract had been permitted to build in disregard of the restriction. Lord Chancellor ELDON said—

"Every relaxation which the plaintiff has permitted, in allowing houses to be built in violation of the covenant, amounts *pro tanto* to a dispensation of the obligation intended to be contracted by it. Very little, in cases of this nature, is sufficient to show acquiescence; and courts of equity will not interfere unless the most active diligence has been exerted throughout the whole proceeding. * * * * In every case of this sort, the party injured is bound to make immediate application to the court in the first instance; and cannot permit money to be expended by a person, even though he has notice of the covenant, and then apply for an injunction. Taking all the circumstances together, the permission to build contrary to the covenant, and the laying by, four or five months, before filing the bill, this is not a case in which a court of equity ought to interfere by injunction, but the plaintiff must be left to his remedy at law."

So, also, *Peek v. Matthews* (1867), L. R. 3 Eq. 515; *Gaskin v. Balls* (1879), L. R. 13 Ch. Div. 324; *Eastwood v. Lever* (1863), 4 DeG. J. & S. 114; *Child v. Douglass* (1854), 5 DeG. M. & G. 739.

The waiver relied upon, must be in respect of a material violation of the covenant. In *German v. Chapman* (1877), L. R. 7 Ch. Div. 271, the law is recognized to be, as stated in *Roper v. Williams*, that—

"If there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely, or so substantially changed, as that the whole character of the place or neighborhood has been altered, so that the whole object for which the covenant was originally entered into, must be considered to be at an end, then the covenantee is not allowed to come into the court for the purpose merely of harassing and annoying some particular man, where the court could see he was not doing it *bona fide*, for the purpose of effecting the object for which the covenant was originally entered into."

The Court (in *German v. Chapman*) then proceeded—

"That is very different from the case we have before us, where the plaintiff says that in one particular spot, far away from this place, and not interfering at all with the general scheme, he has, under particular circumstances, allowed a waiver of the covenant. I think it would be a monstrous thing to say that nobody could do an act of kindness, or that any vendor of an estate, who had taken covenants of this kind from several persons, could not do an act of kindness, or from any motive whatever, relax in any single instance any of these covenants, without destroying the whole effect of the stipulations which other people had entered into with him. For instance, in this very case, application was made to the plaintiff for a waiver. It would be monstrous to suppose, if he had acceded to that application, that therefore he was, by the mere act of kindness to the defendants themselves, destroying the whole benefit of the covenants as to all the rest of the estate."

The same ruling in *Western v. Macdermott* (1866), L. R. 1 Eq. 499, s. c. affirmed on appeal (1866), L. R. 2 Ch. App. 72; *Kent v. Sober* (1851), 1 Sim. N. S. 517.

Where a contingency has happened, not within the contemplation of the parties, which imposes upon the property a condition frustrating the scheme devised by them, and defeating the object of the covenant, thus rendering its enforcement oppressive and inequitable, a court of equity will not decree such enforcement. In *Trustees of Columbia College v. Thatcher* (1881), 87 N. Y. 311, the covenant was not to erect, establish or carry on in any manner, on any part of the said lands, any stable, school-house, engine house, tenement or community house, or any kind of manufactory, trade or business whatsoever, or erect or build, or commence to erect or build, any building or edifice with intent to use the same, or any part thereof, for any of the purposes aforesaid. The breaches relied on by the plaintiff were that the defendant permitted the use of the several rooms in the houses upon the premises by his tenants, for the business of a tailor, milliner, insurance agent, newspaper dealer, tobacconist and two express carriers. It also appeared that the general current of business had reached and passed the premises, and that during the pendency of the action, an elevated railroad was built with a station in front of such premises, which the trial court found affected them injuriously, and rendered them less profitable for the purpose of a dwelling house, but did not render their use for business purposes indispensable. The evidence also disclosed that the station covered a portion of the street, its platform occupied half the width of the sidewalk in front of defendant's premises, and from it persons could look directly into the windows, and that this, with the noise of the trains, rendered privacy and quiet impossible, so that large depreciations in rents and frequent vacations followed the construction of the road. Mr. Justice DANFORTH, speaking for the Court, said:

"It is now claimed by the appellant that there has been such an entire change in the character of the neighborhood of the premises, as to defeat the object and purpose of the agreement, and that it would be inequitable to deprive the defendant of the privileges of conforming his property to that character, so that he could use it to his greater advantage, and in no respect to the detriment of the plaintiff. The agreement before us recites, that the object which the parties to the covenant had in view was 'to provide for the better improvement of the lands, and to secure their permanent value.' It certainly is not the doctrine of courts of equity to enforce, by its peculiar mandate, every contract, in all cases, even where specific

execution is found to be its legal intention and effect. It gives or withholds such decree, according to its discretion, in view of the circumstances of the case, and the plaintiff's prayer for relief is not answered, where, under those circumstances, the relief he seeks would be inequitable. * * * * If for any reasons, therefore, not referable to the defendant, an enforcement of the covenant would defeat either of the ends contemplated by the parties, a court of equity might well refuse to interfere; or if in fact the condition of the property by which the premises are surrounded, has been so altered 'that the terms and restrictions' of the covenant are no longer applicable to the existing state of things. * * * * And so, though the contract was fair and just when made, the interference of the court should be denied, if subsequent events have made performance by the defendant so onerous, that its enforcement would impose great hardship upon him and cause little or no benefit to the plaintiff. * * * * In the case before us, the plaintiffs rely upon no circumstance of equity, but put their claim to relief upon the covenant and the violation of its conditions by the defendant. They have established, by their complaint and proof, a clear legal cause of action. If damages have been sustained, they must, in any proper action, be allowed. But, on the other hand, the defendant has exhibited such change in the condition of the adjacent property, and its character for use, as leaves no ground for equitable interference, if the discretion of the court is to be governed by the principles I have stated, or the cases which those principles have controlled."

See also the *dictum* above quoted (page 85) from *Roper v. Williams* (1822), 1 T. & R. 17.

Object of Restriction.—It must also appear, either from the terms of the agreement, from the circumstances in which it originated, or the situation and condition of the property, that the restriction was intended to benefit that property, and not merely for the personal advantage of the original covenantee: *Keates v. Lyon* (1869), L. R. 4 Ch. App. 218; *Parker v. Nightingale* (1863), 6 Allen (Mass.) 341; *Peck v. Conway* (1876), 119 Mass. 546; *Sharp v. Ropes* (1872), 110 Id. 381; *Clark v. Martin* (1865), 49 Pa. 289; *Tod-Heatly v. Benham* (1888), L. R. 40 Ch. Div. 80. In *Nottingham Patent Brick and Tile Company v. Butler* (1886), 16 Q. B. D. 778, LINDLEY, L. J., stated the law to be as decided in *Harrison v. Good* (1871), L. R. 11 Eq. 338, "that it is an inference of fact in each case, whether the purchasers are bound *inter se* by such covenants, and that the mere fact that the vendor does not bind himself expressly to enforce the covenants which he takes for the benefit of the purchasers, is not material." It is the community of interest in the beneficial restriction which necessarily requires and imports reciprocity of obligation. This in *Renals v. Cowlishaw*

(1878), L. R. 9 Ch. D. 125, the former owners in fee of a residential estate and adjoining lands, sold part of the adjoining lands to the defendant's predecessors in title, who entered into a covenant to build upon the land thereby conveyed, within a certain distance from a particular road; that the garden walls or palisades to be set up along the sides of the said road should stand back a certain distance from the centre of the road; that any house to be built upon the land adjoining the road, should be of a certain value, and of an elevation at least equal to that of the houses on a particular road; and that no trade or business should be carried on in any of such houses or buildings, but that the same should be used as private dwelling houses only. The conveyance did not state that this covenant was for the protection of the residential property, or in reference to the adjoining pieces of land, or make any statement or reference thereto. Other pieces of the adjoining lands were subsequently sold, and the conveyance to the purchaser in each case contained restrictive covenants similar to that above mentioned. The same vendors afterwards sold the residential estate to the plaintiffs' predecessors in title. The conveyances contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them; there was, moreover, in the conveyance to the plaintiffs, a covenant not to build a public house or carry on offensive trades upon a particular portion of the property conveyed, thus limiting their use of the purchased property, but not co-extensively with those covenants first given. Vice Chancellor HALL dismissed a bill to restrain the defendants from building in contravention of the first mentioned covenants. In his judgment he said:

"From the cases * * * it may, I think, be considered as determined, that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by, and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that the right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but where a mutual contract can be sufficiently estab-

ished. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant; whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important."

The Vice Chancellor, being satisfied that the restrictive covenant was not inserted for the benefit of the particular property, but to enable the vendors to make the most of the property they retained, refused to order an injunction. This decision was affirmed by the Court of Appeals in (1879), L. R. 11 Ch. Div. 866, and cited with emphatic approval in *Spicer v. Martin* (1888), L. R. 14 App. Cas. 12; *Master v. Hansard* (1876), L. R. 4 Ch. Div. 718; *Badger v. Boardman* (1860), 16 Gray (Mass.) 559; *Tobey v. Moore* (1881), 130 Mass. 448; *Thurston v. Minke* (1870), 32 Md. 487. And where the restrictions are made for the benefit of the property, and enure in favor of the persons who become the respective owners of it, the original covenantee cannot by release discharge any part of it except such as he still retains: *Raynor v. Lyon* (1887), 46 Hun. (N. Y.) 227.

Title to land within the tract, for the common benefit of which the easement is created, is the only other requisite to support a prayer for an injunction to restrain a violation of the covenant by any proprietor. As restrictions of this nature are intended for the mutual protection of all the proprietors, neither privity of contract nor privity of estate is essential, and a prior may have a remedy against a subsequent purchaser of part of the same tract, even when a parol representation of a uniform building plan is the sole evidence of the contract: *Tobey v. Moore* (1881), 130 Mass. 448; *Talmadge v. The East River Bank* (1862) 26 N. Y. 105; *Gibert v. Peteler* (1868), 38 Id. 165; *Green v. Creighton* (1861), 7 R. I. 1.

It is necessary that the defendant purchase with full notice of the agreement. It is binding upon him, not because he stands as assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform: *Whitney v. Union Ry. Co.* (1858), 11 Gray (Mass.) 359; *Phoenix Ins. Co. v. Continental Ins. Co.* (1882), 87 N. Y. 400. And slight circumstances will be construed as equivalent to notice of the existence of the equity. Thus, in *Tallmadge v. The East River Bank*, cited above, the uniformity in the position of houses erected in the immediate neighborhood, in conformity with a general building plan, was held to be sufficient to put the purchaser on inquiry and charge him with notice. Similarly, *Salisbury v. Andrews* (1880), 128 Mass. 336; *Morland v. Cook* (1868), L. R. 6 Eq. 252.

EQUITABLE REMEDIES.

It remains only to consider what will amount to a violation of an equitable easement, and the remedy which a court of equity will apply. The owner of the servient tenement can do no act on his land which interferes substantially with the easement, or with those rights which are requisite to the full enjoyment of its benefits; but the utmost extent of the duty which rests on the owner of the servient tenement, is not to alter its condition so as to interfere with the enjoyment of the easement: Gal. & What. on Ease't. 7, 339; *Kirkpatrick v. Peshine* (1873), 9 C. E. Green (N. J.) 206; *Johnston v. Hyde* (1881), 6 Stew. Eq. (N. J.) 632. The extent to which the owner of the servient tenement is interdicted from the exercise of acts of ownership on his lands, will depend on the nature and qualities of the easement: *Atkins v. Bordman* (1841), 2 Metc. (Mass.) 457. Where a penalty or forfeiture is annexed to the doing of the act prohibited, this penalty does not authorize the party to do the act, and before the act is done, the Court will restrain him by injunction, unless it appears from a fair construction of the instrument that it was intended to make the stipulated sum the price of non-performance; but if the act is done the penalty must be paid, and the amount is unimportant: *French v. Macale* (1842), 2 Dru. & War. 269;

Coles v. Sims (1854), 5 DeG. M. & G. 1; *The Phoenix Ins. Co. v. The Continental Ins. Co.* (1882), 87 N. Y. 400; *The Diamond Match Co. v. Roeber* (1887), 106 Id. 473; *National Provincial Bank of England v. Marshall* (1888), L. R. 40 Ch. D. 112. Nor is it necessary to show that any damage has been done. A covenantee has the right to have the actual enjoyment of the property, *modo et forma*, as stipulated for by him. The mere fact that a breach of the covenant is intended, is a sufficient ground for the interference of the court by injunction: *Kirkpatrick v. Peshine* (1873), 9 C. E. Green (N. J.) 206.

The usual and proper equitable remedy for a breach of a negative covenant or agreement, is an injunction. This will be awarded as of course, upon proof of the complainant's right and its violation by the defendant. In some cases, the court will import a negative quality into the covenant, and enforce the right by injunction: *Kerr's Injunctions in Equity*, 521; *Newman v. Nellis* (1884), 97 N. Y. 285. Thus, in the English brewers' leases, covenants are usually inserted stipulating for the purchase from the lessor of all the beer consumed at the public house demised. Such rights will be protected by injunction, against assignees with notice, even where they extend to other public houses held by the same lessees under other landlords: *Luker v. Dennis* (1877), L. R. 7 Ch. Div. 227; *Catt v. Tourle* (1869), L. R. 4 Ch. App. 654. The ground of decision is, that the grant of an exclusive right of this description, contained in a covenant, is equivalent to a negative covenant, and the cases are thus brought under the operation of the rule in *Lumley v. Wagner* (1852), 1 D. M. & G. 604, that wherever a court of equity has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, so far as they can be bound, to a true and literal performance of their agreements, and will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. By thus importing a negative quality into an affirmative covenant, the courts have assumed to enforce agreements of which specific performance could not be decreed: *Cooke v. Chilcott* (1876), L. R. 3 Ch. Div. 694. The propriety

and extent of this exercise of jurisdiction it is not within the scope of the present article to examine.

Where interference with the easement is merely threatened, the preventative remedy by injunction is always adequate to the exigencies of the case; but if there has been an actual interference, a mandatory injunction may become necessary to supplement the usual remedy. The power of the court to grant such relief, though once questioned, is now admitted beyond doubt. In *Rankin v. Huskisson* (1830), 4 Sim. 13, the agreement was that no buildings should be erected on the plot of ground, south of the demised premises. The complainants built thereon, and afterwards the defendants began to erect stables on the adjoining land. Vice-Chancellor SHADWELL awarded an injunction restraining the defendants, not only from continuing the projected buildings, or commencing any other buildings whatever, on the plot of ground described in the pleadings, or any part thereof, but also from permitting such part of said building as had been already erected to remain thereon. See note (1) to *Rankin v. Huskisson*; Kerr on Injunc., 231. The extreme limit of this jurisdiction, however, is the restoration of the property to its condition at the time the wrongful act or neglect began.

As has been said, specific performance of a proper covenant to perform positive acts, will be decreed, if the covenant is one which runs with the land, or if the bill is filed against the original covenantor. What are proper covenants under this head of equitable jurisdiction is a question to be determined solely under the rules regulating the granting of that kind of relief. It is unnecessary to discuss its limitations here.

SHERRERD DEPUE.

Newark, New Jersey.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

WESTMORELAND AND CAMBRIA NATURAL GAS CO.

v.

DE WITT ET AL.

Natural gas belongs to the owner of the land, and is a part of it, and, so long as it is on or in it, is subject to his control; but when it escapes, and goes into other land, or comes under another's control, the title of the former owner is gone.

If an adjoining or distant owner drills a well on his own land, and taps his neighbor's vein of gas, so that it comes into his well and under his control, such gas belongs to the owner of the well.

The owner of land, leasing it to another for the purpose of drilling gas wells thereon, and reserving the right to till the soil, after the lessee has drilled a well and has gas ready to flow into pipes by turning a valve, cannot claim that the lessee is not in possession, and that he must resort to a court of law to establish his title before a court of equity will interfere.

The grant by lease of a certain tract of land for the purpose of sinking and operating gas wells, "no wells to be drilled within 300 yards of the brick building" on the tract, is a release of the right of the grantor to lease the land within such 300 yards, for the purpose of sinking and maintaining a gas well.

If both parties disregard the strict terms of a lease, respecting payment at the lessor's request, and no attention is paid to a delay in part of a payment, and no demand is made therefor by the lessor, such acts constitute a waiver of the right to demand a forfeiture for non-payment.

A payee, by saying that it will be useless to exhibit the money to him, when the money is present, waives his right thereafter to insist that no proper tender in that respect was made.

Appeal from Court of Common Pleas of Westmoreland County.

Moorhead & Head, for appellant.

D. S. Atkinson, J. M. Peoples, Vin. E. Williams, and W. A. Griffith, for appellees.

MITCHELL, J., November 11, 1889. Complainants filed a bill, setting forth a lease of land from Brown, one of the respondents, for oil and gas purposes; the expenditure of large sums of money under the lease; a subsequent lease of the same land by Brown to the other respondents, who took with knowledge of complainants' rights; and the entry by them with the intent to drill a well upon the said land, and take gas, etc. The bill concluded with an averment that such a well could be drilled

and put in operation in about forty days, long before an adjudication could be had upon the rights of the parties, and that thereby enormous waste would be committed upon the premises of complainants, and irreparable injury to their interests; wherefore they prayed an injunction, etc. The answer of respondents substantially admitted all of the facts set up in the bill, except that the well which they were about to drill was on premises leased to complainants, and that irreparable injury to complainants would result therefrom; and further setting up that the lease to complainants had been forfeited for non-payment of certain moneys due thereunder.

Two issues, therefore, were raised by the pleadings: *First*, whether the well contemplated by the respondents was upon the leased land; and, *secondly*, whether there had been a forfeiture of the lease. The actual fact not being disputed, both these issues really turned on the construction of the lease. Under these issues the parties went on for some months, and completed their evidence. When, however, the case came to be argued before the master, the respondents took the ground that the complainants, being out of possession, and their title being disputed, had no standing in equity, but must first establish their rights at law. The learned master adopted this view, found as a fact that complainants were out of possession, and reported, as a conclusion of law therefrom, that the bill must be dismissed. The Court below adopted this report with only a formal opinion, expressing unwillingness to say the master had erred.

The master finds formally that, "during several months prior to the filing of the bill, Brown, claiming a forfeiture of said lease, had taken full and absolute possession of the premises and rights mentioned and granted in the lease." An examination, however, of the evidence fails to disclose a single fact on which such a finding can be sustained. It rests entirely on a misconception of the subject-matter of the possession in question, and the nature of the possession itself of which the subject-matter admitted. The subject of possession was not the land, certainly not the surface. All of that, except the portions actually necessary for operating purposes, was expressly reserved by the lease to Brown, the lessor. Except of such por-

tions, the complainants had no possession that was not concurrent with that of the lessor, if, indeed, it could be called possession of the land at all. Complainants' right in the surface of the land under the lease was rather in the nature of an easement of entry and examination, with a right of possession arising where a particular place of operation should be selected, and the easement of ingress, egress, storage, transportation, etc., during the continuance of the operation. The real subject of possession to which complainant was entitled under the lease, was the gas or oil contained in, or obtainable through, the land.

The learned master says, gas is a mineral, and while *in situ*, is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water also is a mineral; but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing, or even to percolating, waters.

Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their "fugitive and wandering existence within the limits of a particular tract was uncertain," as said by Chief Justice AGNEW in *Brown v. Vandegrift* (1875), 80 Pa. 147, 148. They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his. And equally so as between lessor and lessee in the present case, the one who controls the gas—has it in his grasp, so to

speak—is the one who has possession in the legal as well as in the ordinary sense of the word.

Tested by these principles, there is not the slightest doubt that the possession of the gas, as well as the right to it under this lease, was in the complainants when the bill was filed. They had put down a well, which had tapped the gas-bearing *strata*, and it was the only one on the land. They had it in their control, for they had only to turn a valve, to have it flow into their pipe, ready for use. The fact that they did not keep it flowing, but held it generally in reserve, did not affect their possession any more than a mill-owner affects the continuance of his water-right when he shuts his sluice-gates. On the other hand, Brown had no possession of the gas at all. His possession of the soil for purposes of tillage, etc., gave him no actual possession of the gas; and he had no legal possession, for his lease had conveyed that to another. How, then, had he taken "full and absolute possession of the premises and rights," as found by the master? Apparently, he had asserted to the complainants his claim that the lease was forfeited. In addition, on one occasion, when the agent of complainants was at their well for a specific purpose, Brown had ordered him off the land; but there is no evidence that he went until he had finished his business there. Shortly before this the complainants had sent men on the land to begin the erection of a derrick for a second well, and Brown had ordered them off. This, which is the strongest item in the proof, is really no evidence at all of dispossession of complainants. They still remain in possession of their well, which gave them the sole control of the gas, so far as its utilization was concerned, and the sole possession of which it was capable, apart from the land, from which it had been legally severed by the lease. The utmost that can be said of such an occurrence is that it was a violent and temporary interference with that portion of complainants' rights which authorized them to put down a second well. This was no more a dispossession of complainants from their occupation of the gas than blocking up one of a farmer's roads to his home would be an ouster from his farm. We are therefore of opinion that the master was wrong in finding as a fact

that complainants were out of possession, and should be remitted to an ejectment to establish their title at law.

As to the other objections to the jurisdiction of equity, they require but a brief notice. The bill is a bill to stay waste, and that the damage threatened, even if not irreparable, is entirely incapable of measurement at law, cannot be seriously questioned. Such cases were among the earliest, and have always been among the most incontestable, within the chancellor's jurisdiction. It is superfluous to cite authorities for so familiar a principle, but I may refer to *Allison's Appeal* (1875), 77 Pa. 221, as a recent case in this Court, where the invasion restrained, was of complainants' right to oil, a fluid far more capable of accurate measurement than gas.

The learned master having come to the conclusion that the bill should be dismissed for want of equity, forbore to consider and pass upon the substantial issues raised by the pleadings. But as the evidence was fully taken by both parties before him, and he has found all the facts necessary to a final determination of the whole controversy, we will proceed to consider it. The actual facts, as already said, are not disputed, and both issues substantially depend upon the construction of the lease.

We have therefore to consider—*First*, whether the well threatened to be put down by respondents was upon the leased land. Of this there cannot be the slightest doubt. The lease is of "all that certain tract of land," etc. This means the whole tract. The grant is limited as to the intention "for the sole and only purpose of drilling and operating wells," etc., but is not limited as to territory. Following the description of the tract is the clause on which respondents rely—

"No wells to be drilled within three hundred yards of the brick building belonging to J. H. Brown."

The well which respondents propose to bore is within this prohibited distance; and the respondents claim that Brown, and they as his lessees, have the right to drill wells within that part of the territory. But the clause in question is neither a reservation nor an exception as to the land, but a limitation as to the privilege granted. It does not, in any way, diminish the area of the land leased,—that is still the whole tract; but it restricts the operations of the lessees in

putting down wells to the portions outside of the prohibited distance. For right of way and other purposes of the lease, excepting the location of wells, the space inside the stipulated line is as much leased to the lessee as any other part of the tract. The terms of the grant would imply the reservation to the lessor of the possession of the soil for purposes other than those granted to the lessee, and the parties have expressed what otherwise would have been implied by the provision that the lessor is to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for said operating purposes.

From the nature of gas and gas operations, already discussed, the grant of well-rights is necessarily exclusive. It was so held even as to oil-wells, in *Funk v. Haldeman* (1867), 53 Pa. 229, 247, 248, although, in that case, the plaintiff had a mere license to enter, etc., and not, as complainants here, a lease of the land; and it is exclusive, in the present case, over the whole tract. As already said, the clause relative to the 300-yards distance was a restriction on the privilege granted, not a reservation of any land, or any boring rights, to the lessor; and a well upon the prohibited portion was just as damaging to the lessees as upon any other portion of the tract. The drilling of the well threatened by respondents, is therefore in violation of the lease, and should be enjoined if the lease is still in force.

Secondly, has there been a forfeiture of the lease? It is claimed by respondents on account of the failure of the lessee to make certain stipulated payments. The lease is dated December 7, 1885, and by its terms the lessee was to pay \$500 a year for each gas-well, payable quarterly, in advance, from the completion of each and every well; and in case one well should not be completed within three months from the date of the lease, then to pay

"For such delay the sum of one hundred and twenty-five dollars every three months from the date of this agreement; * * * and [lessor] agrees to accept such sum as full consideration and payment for such delay until one well shall be completed; and a failure to complete one well, or to make any of such payments, within such time and at such place as above mentioned, renders this lease null and void. * * * It is further agreed that if any of the within payments remain unpaid thirty days, then this lease to be null and void."

These are all the provisions which bear upon the present question, and their effect is entirely clear. One well is to be completed in three months, and the rent is to begin from its completion. This is the primary intent and expectation of the parties. But, if not so completed, then the lessee is to pay a like amount from the date of the agreement, until one well is completed, and thereafter, of course, the payments are not to be for delay at the end of each three months, but as rent, quarterly, in advance. A failure to pay any of the sums due for a period of 30 days, is to render the lease null and void. The first provision for forfeiture cannot be read literally and separately, as it is in manifest conflict with the other covenants. Thus it invokes a forfeiture for failure to complete one well in three months, but in so doing it is repugnant to the agreement to accept the stipulated "full consideration and the payment for delay." Again, it imposes the forfeiture for failure to make any of the payments at the time and place mentioned, and in so doing is in conflict with the subsequent agreement that the forfeiture shall only be for a default of 30 days. Reading all these clauses together, therefore, as we are bound to do, the last-mentioned clause, calling for a forfeiture upon a default of 30 days in the payments, is the only one that is effective for the purpose of forfeiture.

Before passing to the acts of the parties, it may be well to notice very briefly the construction of the agreement set up by the respondents in their answer, though not pressed in their argument. It is that the default in payment *ipso facto* created a forfeiture; or, in other words, that the forfeiture was absolute and self-operating, without regard to the acts or wishes of the parties. Such a construction is utterly untenable. It is contrary, not only to the settled rules of law, but to the manifest intentions of the parties. This question is definitively settled in *Wills v. Gas Co.* (at the present term, Nov. 11, 1889), the opinion in which is filed herewith by our Brother CLARK.

Coming now to the facts as reported by the master and practically undisputed, we find that the parties from the outset, entirely disregarded the strict times and terms of payment, as set out in the lease. On the day following the date of the lease, the lessees paid \$250 on account. It is admitted

that such payment was made, and that it was a voluntary advance, as nothing was or would be due under the lease for three months, and then only half that amount. In June, another payment of \$250 was made, and this, again, was more than was due under any possible construction of the lease. A quarterly payment for delay had become due on March 7, 1886. The well being completed April 23, there would, under the construction contended for by the lessor, then be due compensation for the 46 days of additional delay, amounting to \$65, and a quarter's rent in advance, which latter was covered by the advance of \$250 in the previous December. The June payment, therefore, fully covered this \$65, another quarter's rent from July 23 to October 23, and an advance of \$60—nearly one-half the quarter's rent that would become due in October, four months later. This calculation, as already said, is upon the most favorable possible construction for the lessor. But in fact there is not the slightest doubt that both parties entirely disregarded the strict terms of the lease as to times of payment, and treated the payments of December and June as semi-annual advances of the stipulated sum, no matter whether called "compensation for delay" or "rent," as the amounts in either case were exactly the same. Neither party paid the least attention to the possible lag end of a quarter's delay, the lessor never demanded it, no reference to it was made at the time of the June payment, and it made its appearance in the transactions months later as an after-thought.

Forfeitures, if no longer odious—and I for one am too strongly in favor of the enforcement of contracts as parties make them, to apply harsh names to strict constructions—are yet not favored, either at law or equity, and among the least favored have always been those founded on mere delay in the payment of money. In this case, there is not the slightest pretense of any other ground for forfeiture, than the failure to pay a small amount of money in advance. As already shown, not a single payment under this lease was made strictly according to its terms; the departure was begun by the lessor's request, and was always in his favor. To allow him now to turn around without notice and enforce a forfeiture for a fail-

ure of the insignificant proportions shown, would be sanctioning a fraud such as no court has ever permitted.

There is another ground equally fatal. Forfeitures are always strictly construed; and, looking at the facts, none has been incurred here, even on respondent's own view of the amounts due. As already seen, the June payment, deducting the \$65 for delay, still paid the quarter's rent beginning July 23, and nearly half of the quarter beginning October 23, 1886. Under the lease, a forfeiture would not be incurred unless a payment should remain unpaid for 30 days. On October 23, a quarter's rent was due in advance, but only half of it was unpaid, for half of it had been paid in advance in the preceding June. The lease does not provide a forfeiture for failure to pay a balance, but only "if any of the within payments remain unpaid," which means a whole payment, not a balance on a running account. No forfeiture, therefore, was incurred, or could be, until the next payment should become due and be unpaid for 30 days. The next quarter day was January 23, 1887; and a week before that date, on January 15, the lessees tendered the rent to Brown, and it was refused. The master's findings of fact, under the view he took, do not extend to the occurrences of January 15, 1887; but the testimony was taken by both parties, and leaves no doubt that there was a valid tender. Both Rhodes and Webb say the money was held in one hand, where Brown could see it, while the voucher was read to him; and Brown himself says Rhodes told him he had come to pay, though he did not actually see the money, and that he told Rhodes it would "be altogether unnecessary" to show the money. This, under the circumstances, dispensed with further formalities. Whether, therefore, we regard the strict conditions of the lease as waived by the conduct of the parties, or the failure in payment as only a partial and incomplete default, it is equally clear that there was no forfeiture, and the respondents have failed to show any defense to the bill.

The decree is reversed, the bill reinstated, and the injunction reinstated, made perpetual, and directed to be so issued; costs to be paid by the appellees; and the record is remitted to the Court below to execute this order.

NOTE.—The analogy between natural gas and petroleum is so striking that we propose to cite cases respecting both of them.

An "Internal Improvement"—*Right of Eminent Domain*. An Act of West Virginia (Act of February 27, 1867; Laws of 1867, Ch. 95, p. 110; amended February 26, 1868; Laws of 1868, Ch. 67, p. 63) created a corporation "to lay out and construct or cause to be laid out and constructed and maintained a line or lines of tubing, for the purpose of transporting petroleum or other oils through pipes of iron or other materials," in certain counties, "to any railroad or other roads, or to any navigable stream or streams in or adjoining" the counties named, "and to transport from the termini of said pipe or pipes, petroleum or other oils in tank cars, boats or other receptacles belonging to said company." The Act established the maximum charges the company could make for transportation. This was a special Act; and the Constitution (of 1863) provided that "The Legislature shall pass general laws whereby any number of persons, associating for mining, manufacturing, insuring, or other purpose, useful to the public, excepting banks of circulation, and the construction of works of internal improvement, may become a corporation," etc.

The Court held that this company was engaged in a work of "internal improvement," and its charter authorized by the Constitution: *West Virginia Transportation Co. v. Volcanic Oil and Coal Co.* (1872), 5 W. Va. 382.

The transportation and supply of natural gas for public consumption is recognized as a public use in Pennsylvania; and the right of eminent domain granted to such corporations by the Act of 1885, is within the constitutional power of the Legislature to grant. "It

is a curious objection to set up against the Act of 1885, in view of the present consumption of natural gas, that its use is not a public one, and that, therefore, those corporations which are engaged in its transportation, may not be vested with the right of eminent domain. As well might this objection be urged against the vesting of this power in those companies which have been incorporated for the purpose of supplying our towns and villages with water, in which the public interest is found not in the transportation, but in the use of that fluid, after it has, by these agencies, been transported. Nor would it seem to us as of the slightest materiality that the water thus produced, had been drawn from a simple spring, well or basin. Just so with natural gas; it has become a public necessity, but as it cannot be used except it be piped to the manufactories and residences of the people, it follows that as the piping of it is necessary to its use, the means so used for its transportation must be of prime importance to the public, and directly affect its welfare." *Per Curiam, Johnston v. People's Natural Gas Co.* (Sup. Ct. Pa., Nov. 15, 1886). To the same effect, *Bloomfield & Rochester Natural Gas-Light Co. v. Richardson* (1872), 63 Barb. (N. Y.) 437; *Appeal of Pittsburgh* (1886), 115 Pa. 4; *Carothers v. Philadelphia Co.* (1888), 118 Id. 468.

[The Pennsylvania Act of 1885 (P. L. pp. 33-35) provides—"SECTION 10. The transportation and supply of natural gas for public consumption, is hereby declared to be a public use, and it shall be the duty of corporations, organized or provided for under this Act, to furnish to consumers along their lines and within their respective districts, natural gas for heat, or light, or other purposes, as the corporation may determine. Any and all corporations that is, or are now, or shall hereafter be engaged in such

business, shall have the right of eminent domain for the laying of pipe lines for the transportation and distribution of natural gas; the right, however, shall not be exercised as to any burying ground or dwelling, passenger railroad station-house, or any shop or manufactory in which steam or fire is necessarily used for manufacturing or repairing purposes, but shall include the right to appropriate land upon or under which to lay said lines and locate pipes upon or over, under and across, any lands, rivers, streams, bridges, roads, streets, lanes, alleys, or other public highways, or other pipe lines, or to cross railroads or canals: *Provided*, In case the pipe lines cross any railroad, operated by steam, or canal, the same shall be located under such railroad or canal, and in such manner as the railroad or canal company may reasonably direct. *And provided further*, That any company laying a pipe line under the provisions hereof, shall be liable for all damages occasioned by reason of the negligence of such gas company: *And provided further*, That no company authorized by this Act, shall have the right to occupy longitudinally, the right of way, road bed, or bridge of any railroad company: *And provided*, If any pipe line laid under the provisions of this Act, or laid upon or over lands cleared and used for agricultural purposes, the same shall be buried at least twenty-four inches below the surface, and if any line of pipe shall be laid over or through any waste or woodland, which shall be changed to farming land, then it shall be the duty of the corporation to immediately bury the said pipe to the depth of at least twenty-four inches as aforesaid.

Prior to any appropriation, the corporation shall attempt to agree with the owner as to the damage properly payable for an easement in his or her property, if such owner can be found and

is *sui juris*, failing to agree, the corporation shall tender to the property owner a bond with sufficient sureties to secure him or her in the payment of damages; if the owner refuse to accept said bond or cannot be found or is not *sui juris*, the same shall then be presented to the Court of Common Pleas of the proper county, after reasonable notice to the property owner, by advertisement or otherwise to be approved by it. Upon the approval of the bond, and its being filed, the right of the corporation to enter upon the enjoyment of its easement shall be complete. Upon petition of either the property owner or the corporation, thereafter, the Court of Common Pleas shall appoint five disinterested freeholders of the county to serve as viewers to assess the damages proper to be paid to the property owner, for the easement appropriated by the company, and shall fix a time for their meeting of which notice shall be given to both parties.

Either party may appeal from the report of the viewers, within twenty days after the filing thereof, to the Court of Common Pleas, and have a jury trial as in ordinary cases, and writ of error to the Supreme Court.

SECTION 11. The right to enter upon any public lane, street, alley, or highway, for the purpose of laying down pipes, altering, inspecting, and repairing the same, shall be exercised in such way as to do as little damage as possible to such highway, and to impair as little as possible the free use thereof, subject to such regulations as the councils of any city may by ordinance adopt.

SECTION 12. In all cases where any dispute shall arise between such corporations and the authorities of any borough, city, township or county, through, over or upon whose highways, or between it and any land owner or corporation, through, over or upon whose property or easement, pipes are to be

laid, as to the manner of laying the pipes, and the character thereof, with respect to safety and public convenience, it shall be the duty of the Court of Common Pleas of the proper county, upon the petition of either party to the dispute, upon a hearing to be had, to define by its decree, what precautions, if any, shall be taken in the laying of pipes, and, by injunction, to restrain their being laid in any other way than as decreed. It shall be the duty of the court to have the hearing and make its decree with all convenient speed and promptness. Either party shall have a right to appeal therefrom, as in cases of equity, to the Supreme Court, but the appeal shall not be a *supersedeas* of the decree, and proceedings shall be had in like manner upon like petition, when and as often as any dispute arises as to pipes already laid, to define the duty of such corporation as to their re-laying, repair, amendment, or improvement.

SECTION 13. Companies incorporated under this Act, and not referred to or included in the next succeeding section hereof, shall not enter upon or lay down their pipes or conduits on any street or highway of any borough or city of this Commonwealth, without the assent of the councils of such borough or city by ordinance, duly passed and approved."

[Section fourteen provides for the acceptance of the provisions of this Act by corporations theretofore incorporated, under certain restrictions contained in this and the two following sections.

[Sections one to eleven provide for incorporation of natural gas companies, and section seventeen for the consolidation of existing corporations. Sections eighteen to the end relate to injuries to works, and to plugging wells.

A statute of Pennsylvania (Act of April 24, 1874, P. L. 70 § 4) provided "that every railroad company, coal company, steamboat company, slack-water navigation company, *transporta-*

tion company, street passenger company," etc., operating "any railroad, canal, slackwater navigation, or street passenger railway, or device for the transportation of freight or passengers," should be subject to pay into the State Treasury a certain tax. Under this law, a petroleum company, conveying oil from wells to tanks and reservoirs by means of pipes, were liable to the tax, as a "transportation company," transporting freight: *Columbia Conduit Co. v. Commonwealth* (1879), 90 Pa. 307; *Appeal of the City of Pittsburgh* (1888), 123 Id. 374.

An Act, passed long before natural gas was in use (Act of April 7, 1870, P. L. 1026, § 2), authorized the formation of a company to buy, maintain, or manage in its own name, "any work or works, public or private, which may tend or be designed to improve, indorse, facilitate, or develop, trade, travel, or the transportation and conveyance of freight, live stock, passengers, or any other traffic, by land or water, from or to any part of the United States." It was held that this authorized the formation of a company to transport natural gas; and the powers of eminent domain given by the statute (§ 4), empowered the company to condemn a right of way for a pipe line: *Carothers v. Philadelphia Co.* (1888), 118 Pa. 468.

Incorporation under General Laws.

The General Corporation Act of Pennsylvania (April 29, 1874, P. L. 73), provides for incorporation for (§2, clause 2, page 74), "XI. The manufacture and supply of gas, or the supply of light or heat to the public by any other means." Their powers were defined to be (§34, p. 93),—"Clause 1. Where any such company shall be incorporated as a gas company, or company for the supply of heat or light to the public, it shall have authority to supply with gas

light, the borough, town, city or district where it may be located, and such persons, partnerships and corporations residing therein, or adjacent thereto, as may desire the same, at such price as may be agreed upon, and also to make, erect and maintain therein the necessary buildings, machinery and apparatus for manufacturing gas, heat or light from coal, or other material, and distributing the same, with the right to enter upon any public street, lane, alley, or highway, for the purpose of laying down pipes, altering, inspecting, and repairing the same, doing as little damage to said streets, lanes, alleys and highways, and impairing the free use thereof as little as possible, and subject to such regulations as the councils of said borough, town, city or district may adopt in regard to grades, or for the protection and convenience of public travel over the same."

In denying the right of a natural gas company to become incorporated under this statute, GREEN, J., *Emerson v. Comm.* (1884), 108 Pa. 111, 125, 126, said—"It seems to us plain that the words of this section contemplate, and authorize, the creation of corporations for the manufacture and supply of gas, and the supply of light or heat, by any other means. Of course the only kind of gas companies that are authorized, are those which manufacture gas, and this necessarily excludes corporations for supplying natural gas, that being a product of nature, and not the result of any manufacturing process. The other companies authorized, are those for supplying light or heat, produced by any other means. * * * The furnishing of natural gas is not the furnishing of heat. Natural gas is not heat. It is a fuel, a substance which may be converted into heat by combustion with atmospheric air. When gas is delivered to the consumer, it is still gas only. It is not heat." In denying a re-argu-

ment, the said Justice said—"Counsel are in error, in supposing that we decided that the Act of 1874 did not authorize the incorporation of companies for furnishing heat from natural gas. We carefully distinguished between charters for furnishing heat and those for furnishing natural gas itself; and we expressly declined to declare the respondent's charter void because it was a charter to furnish heat:" p. 127.

Use of Public Street, or Country Highway.

(See page 115, *infra*.)

The laying of natural gas pipes in a public highway is an additional burden upon the easement; and cannot be done without the payment of damages for the privilege.

A court of equity will restrain the laying of such pipe until the damages are assessed and paid: *Sterling's Appeal* (1885), 111 Pa. 35; *In re Bloomfield and Rochester Natural Gas Light Co.* (1875), 62 N. Y. 386; s. c. below, *Bloomfield and Rochester Natural Gas Light Co. v. Richardson* (1872), 63 Barb. (N. Y.) 437. This rule has been applied by the Common Pleas of Mahoning County, Ohio, even to a street in a city: *Webb v. Ohio Gas Fuel Co.* (1886) 16 Weekly L. Bull. 121, following *The Lawrence R. R. Co. v. Williams* (1878), 85 Ohio St. 168.

Use of a Railroad's Right of Way.

When a railroad company does not take the land condemned, in fee, the original owner may lawfully enter upon the road-bed and lay an oil or gas pipe line under the railroad track: *Hasson v. Oil Creek and Allegheny River R. R. Co.* (1871), 8 Phila. 556.

Ejectment.

"The plaintiff insists that the agreement amounts to a sale of the oil [in the ground] itself, and that the oil, being a part of the land, in a corporeal hereditament, to recover possession of

which ejectment will lie. But if it be conceded that by the contract, there was a grant of the oil, it by no means follows from that alone that ejectment is maintainable. Oil is a fluid like water; it is not the subject of property, except while in actual occupancy. A grant of water has long been considered not to be a grant of anything for which an ejectment will lie. It is not a grant of the soil upon which the water rests: " *Dark v. Johnson* (1867), 55 Pa. 164.

But where the lease of land was for "the sole and exclusive right to bore or dig for oil * * and gather and collect the same * * for the term of twenty years," and for "the sole and exclusive right to mine for coal, iron-ore and all other minerals, which may be obtained on said lands," the lease vested in the lessee a corporeal interest for which ejectment would lie: *Barker v. Dale* (1870), 3 Pitts. (Pa.) 190 [and a receiver will not be appointed, unless under urgent and peculiar circumstances]: *Chicago, etc., Oil and Mining Co. v. U. S. Petroleum Co.* (1868), 57 Pa. 83.

A. granted to B. the exclusive right of boring for oil on a certain farm, reserving the right to farm the surface; if the boring proved profitable, the contract was to be construed as a perpetual lease; if otherwise, possession was to revert to A. On a part of the farm the boring proved profitable. A. brought suit, alleging that the boring had not been profitable on another part of the farm, and asked judgment for possession of that part. The Court held that ejectment would not lie to test A's right to bore for oil; but it would lie, under the agreement, if B. had occupied the land for other purposes, or to an extent greater than allowed by the contract, or if the license was revocable, or had been forfeited by B. The license, when made effectual by a successful re-

sult according to the terms of the agreement, is perpetual and irrevocable: *Rynd v. Rynd Farm Oil Co.* (1870), 63 Pa. 397.

An agreement was to lease "the exclusive right and privilege of boring for salt, oil or minerals upon his farm * * upon which the first party now resides, * * with the right of access to and from such places as may be selected by the party of the second part; * * * said boring to be done so as to do the least possible injury to the farm," for a consideration of \$150, and one third of the product. Holes were to be sunk to satisfy the parties as to practicability and profit for oil. This created an incorporeal hereditament, and the only possession of the grantee was such as was necessary for the enjoyment of the right; the remedy for disturbance of the right was case, and not ejectment: *Union Petroleum Co. v. Oliver Petroleum Co.* (1872), 72 Pa. 173.

[In *Phillips v. Coast*, decided by the Supreme Court of Pa., January 6, 1890 (25 W. N. C. 275), defendants had *bona fide*, and, by mistake, sunk a well on plaintiffs' land, for the purpose of boring for, and extracting oil. Plaintiffs brought an action of ejectment, and a receiver was appointed to keep an account of the product of the well during the continuance of the suit. The Court held that the defendants were entitled to compensation, for their expenses in sinking such well, out of the proceeds of the oil produced. GREEN, J., "This is a kind of improvement of an unusual character, and one which particularly commended itself to the favorable opinion of the Courts. It was an oil well with all the machinery and appliances necessary to its operation. Now without this well and machinery the oil could not possibly be obtained. After it was completed, its operations were all for the benefit of the plaintiffs. * * * Obtaining oil from the bowels of

the earth is a very different thing from obtaining crops from the surface of the ground. The oil only exists at a distance of hundreds of feet below the surface. If it is not developed by means of wells, it is the same as if it had no existence at all. It is in a state of nature, of no use or value whatever to the owner of the land. * * * Therefore it is no hardship whatever to them, to repay to the defendants the bare cost of the well and appliances which belong to the plaintiffs now, and the whole benefits of which accrue to them alone. * * * The proposition that oil is part of the land, and cannot be regarded as mesne profits, and hence the right to compensation for valuable improvements, has no application. The oil has been taken. It is not a question of staying waste, but of allowance for the cost of valuable improvements actually necessary and made in good faith. For such improvements, compensation is allowed, whether that which is taken be mineral oil or other substance of the land or not." *Kille v. Ege* (1876), 82 Pa. 102 and *Ege v. Kille* (1877), 84 Pa. 333, followed.

Liability for Negligence.

A natural gas company is not liable for injuries resulting from the negligence of an independent contractor, occurring before acceptance of his work; unless work is accepted which the company knew, or ought to have known, had been performed in an unsafe and dangerous manner: *Chartiers Valley Gas Co. v. Waters* (1888), 123 Pa. 220; *Same v. Lynck* (1888), 118 Id. 362. The tenth section of the Act of 1885 (*supra*, p. 102) was held, in these cases, to impose no duty, "no express or definite obligation" as regards what work should be done, or how: per HAND, J., 123 Pa. 230.

One taking gas from a natural gas company assumes only the usual and

ordinary risks of such use, but not extraordinary risks caused by the negligence of the company: *Oil City Fuel Supply Co. v. Boundy* (1888), 122 Pa. 449.

A gas company may not lay its pipe on the bottom of a navigable river, without incurring the risk of liability for accidents caused thereby; as where a boat ran on to such a pipe by accident, broke it, and the escaping gas caught fire from the boat's furnace and burned it up: *Ormslaer v. Philadelphia Co.* (1887), U. S. Dist. Ct., W. Dist. Pa., 31 Fed. Repr. 354.

Regulation by a Municipality.

[Under Sections Eleven and Thirteen of the Act of 1885 (*supra*, pp. 103, 104), City "Councils are authorized to give, or withhold their assent, without more. They have no right to couple their assent with any condition, or restriction, not imposed by the Act, unless the company agrees to accept the same, and be bound thereby; and even then the conditions, or restrictions, so accepted by the company, must harmonize and in no wise conflict with the provisions of the Act. * * * In view of the limited authority delegated to Councils, it is a grave mistake to assume, as they appear to have done in this case, that they have power to legislate on any and everything connected directly, or indirectly, with the general subject:" STERRETT, J., *Appeal of City of Pittsburgh* (1886), 115 Pa. 4.

[The Councils of the City of Pittsburgh, under this authority, passed two ordinances, of August 10, 1885, and December 29, 1885, and the following sections were declared void, in the case cited above:

1. That the City Engineer should control the work of laying pipes, to the exclusion of the company.
2. That the pipes should be tested; because indefinite as to how, when, or by whom the test was to be made.

3. That a formal acceptance be made by the company of the ordinance, especially as to those provisions illegal and void.

4. That the company should submit to the city "plans, methods, specifications, and estimates" for the acceptance or refusal of the Commissioner of Highways, with appeal to the Councils, whose action was to be final, when the statute provided for an appeal to the court. Also a provision requiring such plans, on any extension of the pipes.

5. That a showing be made, under oath, of the names of the stockholders, the amount of stock held by each, and that at least fifty per cent. had been paid up, of each subscription, in cash, or, if such is not the case, in what paid; and that no permit be issued unless such Commissioner of Highways is satisfied that there is enough paid up capital to complete the work in accordance with the plans submitted.

6. That a transfer of the privileges of the company to any other corporation be forbidden, under a penalty of a forfeiture of its privileges and all its property, without the assent in majority in value of its stockholders, and the approval of the Council.

7. That the company furnish, upon request of either branch of the Council's street committee, or by the Mayor, City Attorney and City Controller, or any two of them, with the City Controller, a sworn statement of its stockholders, that they hold stock in good faith for themselves and not for others, or, if held by trustees, the names of the persons for whom held, requiring the company to demand this information upon receiving for registry a transfer of the stock.

8. That the City be relieved from liability in case of any neglect of the corporation, resulting in damages to person or property.

9. That a consolidation be forbidden, in any way whatever, of the company

with any other company, when a statute expressly authorized a consolidation upon certain terms.

10. That the City Engineer, in case the company employ careless, incompetent or unskilful men, might discharge such men, and take charge of the work, and complete it, requiring the company to pay estimates in advance for two squares at a time, or the imposition of a forfeiture, in case of a neglect, or refusal, for fifteen days.

11. That the company furnish a bond, conditioned for a faithful compliance with the provisions of the ordinance, and to indemnify the City against all loss, costs, suits, damages and expenses arising from the company's occupation and use of the streets.

The following provisions were held valid:

1. Fixing the depth to which the pipes should be laid, and allowing the City Engineer to designate what portion of the street should be occupied.

2. Requiring the company, when asking the permit, to submit to the Commissioner of Highways a plan and full specifications, showing the streets proposed to be opened, the location, kind and size of pipes.

3. Requiring the "system" to be approved by the City Engineer and natural gas committee of Councils, of escape pipes sufficient to carry off any and all gas which may leak or escape; gauges showing the pressure, open at all times to inspection, at points designated by the City Engineer; and that suitable means be used to protect pipes laid, where there are cinders or other injurious material.

4. Requiring that no pipes be laid between November 15 and April 15.

5. Authorizing the Commissioner of Highways to refuse, in his discretion, permission, if in his judgment the location proposed upon any highway, is injurious to the City; to require altera-

tions of the plans submitted; to limit the number of pipes upon any highway to two trunk lines of competing companies.

6. Requiring the company to pay the expense of repaving, or keeping in repair, for nine months, the streets opened for laying pipes, and that estimates for the cost thereof, for each section, not exceeding two squares, be furnished such Commissioner, and payment of the amount made to him, before permit issued for opening such squares: *Appeal of City of Pittsburgh* (1886), 115 Pa. 4.

The Pennsylvania Act of 1885 (proviso to section 2, P. L., p. 31) forbids the granting, by any borough or city, to any natural gas company, the exclusive privilege to occupy the streets of such borough or city, and therefore a city cannot, under the guise of "regulations," confer an exclusive privilege on a company for two years, requiring work to be begun at a fixed time, and gas to be introduced within fifteen months thereafter: *Meadville Fuel Gas Co. v. Meadville Natural Gas Co.*, decided in the Sup. Ct. Pa., May 31, 1886.

Where a company had a rightful entrance into a city, but the latter refused it the right to cross three streets, whereby great loss was sustained by the company in loss of gas, an injunction was granted to restrain the city's interference with crossing the streets, such a privilege having been granted to a rival company: *People's Natural Gas Co.* (1885), 1 Pa. C. C. 311.

An injunction to restrain a natural gas company from using the streets of a town, because of alleged insufficient protection to the inhabitants in the use of pipes, was refused; thereupon the town passed an ordinance regulating the matter, and asked leave to file a supplemental bill, setting up this ordinance. The Court refused to allow the bill to be filed: *Appeal of Borough of Butler*, decided in the Sup. Ct. of Pa., Nov. 11, 1886.

Unreasonable Rates.

A natural gas company, having the power to exercise the right of eminent domain, and to occupy the streets of a city or town, must serve all alike, and furnish gas at reasonable rates. This is especially so under a statute declaring that the transportation and supply of such gas is of public benefit, and preventing the granting, by a town or city, to any company, the exclusive privilege to occupy the streets and supply gas. Where a company, in a State where such a statute was in force, after furnishing gas at a reasonable price, with assurance of continuance, secured a monopoly by terms made with competing companies, demanded excessive rates and threatened to shut off the gas unless the increased rates were paid, a preliminary restraining order was granted upon bill and affidavit, until the question could be more thoroughly investigated: *Waddington v. Allegheny Heating Co.* (1888), 6 Pa. C. C. 96; *Swickley Borough v. Ohio Valley Gas Co.* (1888), 6 Id. 99. See *Appeal of Scranton Electric Light and Heat Co.* (1888), 122 Pa. 154.

[See *Gas and Water Companies*, 27 AMER. LAW REG. 277.

Oil is a Mineral.

The Act of Pennsylvania (April 25, 1850, P. L. 573) relating to accounts between tenants in common of coal or iron ore mines or minerals, includes oil or petroleum, under the general term of "other minerals"; and the fact that oil was not known when the Act was passed (1850), does not alter the case: *Thompson v. Noble* (1870), 3 Pitts. (Pa.) 201. A "mineral, and being a mineral, is part of the realty:" *Slough-ton's Appeal* (1879), 88 Pa. 198. But a reservation of "all minerals," in a deed, does not include petroleum: *Dunham v. Kirkpatrick* (1882), 101 Pa. 36. *Ownership of Oil.*

Severance of oil from the freehold does not divest the owner of the title,

nor his right to the immediate possession, nor his replevying it, nor recovering its value if he sees fit. Oil in a well sunk by the owner of land is his exclusive property, whether drawn from an underground current of oil, or found standing. The case is not analogous to the surface owner's right in running streams of water. Such oil taken out of the well by a wrong-doer, remains the property of the well-owner: *Hail v. Reed* (1854), 15 B. Mon. (Ky.) 479.

Leases.

"Oil" is not synonymous with "gas": therefore a lease of land to be occupied and worked for petroleum, rock or carbon oil, and not for any other purpose whatsoever; conditioned that if no oil be found in paying quantities within four years, the lease to be null and void, is not satisfied by the finding of gas: *Truby v. Palmer*, decided in the Sup. Ct. of Pa., October 4, 1886.

Oil land, described by metes and bounds, with a "protection" of eight rods on the north side and ten rods on the east side, was leased to E. It was claimed that the north and east lines of the protection were not to be extended respectively beyond the east line and north lines of the leased property; and consequently the tract in the northeast corner, eight by ten rods, could be leased by the owner to T. for the purposes of sinking an oil well. The Court held that it could not; that the tract of eight by ten rods was within the "protection;" and having leased this tract, T., who sank a well, and thereby injured A.'s well on the leased premises, was liable to E. for damages, and would be enjoined in the same action: *Allison & Evans' Appeal* (1875), 77 Pa. 221.

B. leased to L. a tract of land, L. to have the sole right to bore for oil for twenty years, L. to commence operations in sixty days and to continue with due diligence; if L. ceased operations

twenty days at any one time, B. could resume possession. It was stipulated that L.'s failure to comply with any one of the conditions, should work a forfeiture, and B. might enter and dispose of the premises as if the lease had not been made. It was also stipulated that if L. did not commence work at the time specified, he should pay B. \$30 a month until L. should commence. Held, that the covenant of forfeiture was modified, not abrogated, by the clause for payment of rent; and L., having failed to to commence work for four months and then paying rent, was not entitled, at the end of eleven months from the date of payment, to tender the rent due and insist upon a continuation of the lease: *Brown v. Vandergrift* (1875), 80 Pa. 142.

A grant of certain land, in consideration of money paid, for the privilege of going upon it to prospect and bore for oil, with the exclusive use of one acre around each well, and with free ingress and egress in common with the grantor, the latter to have one-third of all "that is taken out" and the right of tillage of the land not occupied in operating the wells, does not amount to a lease nor sale of the land or oil, no estate in soil or oil being granted. The right of the grantee is to experiment for oil, sever it from the soil and take it, on yielding one third to the grantor. The right of the grantee is a mere license to work the land for oil, coupled with an interest, not revocable at the pleasure of the grantor or licensor: *Funk v. Haldeman* (1867), 53 Pa. 229.

A lease of land for oil required operations to be commenced within sixty days from the date of lease, one well to be completed within three months after such operations are begun; and, in case of a failure to complete one well within that time, the lessee was to pay the lessor for such delay \$1000 per annum, within three months after the time of

completing such well. It was also covenanted that a failure to complete one well, or make such payment within that time, "renders this lease null and void, and to remain without effect between the parties thereto." The lessee did nothing towards drilling a well, nor did he make any payment within three months after a well should have been completed. It was held that a forfeiture of the lease did not happen until default was made, both in completing the well and in paying for the delay, or failure to complete it. But the lessee having neither drilled the first well nor paid the price of delay, the lessor was entitled to recover at the stipulated rate, for the time the lessee held exclusive right to operate: *Galey v. Kellerman* (1889), 123 Pa. 491.

An assignee of an oil-and-gas-lease is not liable to the lessor, upon a covenant of the lease to drill a well upon the demised premises, when the time for performance had elapsed before the assignee acquired title under the assignment: *Washington Natural Gas Co. v. Johnson* (1889), 123 Pa. 576.

B. leased A's farm for the purpose of exploring for oil, at a royalty of one-eighth of the production. He covenanted "To continue, with due diligence and without delay, to prosecute the business to success or abandonment; and if successful, to prosecute the same without interruption, for the common benefit of the parties." He assigned an interest in the lease to C. and D., and they with B. assigned to E. Two wells were bored, both of which were producing wells. E. refused to bore any other wells. A. sued E. upon the covenant quoted. It was held that this covenant was not the personal covenant of B., but a covenant running with the land, and binding on E.: and that the measure of damages was the amount of the oil A. ought to have received above the actual receipt, and the value of it

during the times when it should have been delivered to him; deducting therefrom the cost of producing, what ought to have been produced at the time, under the circumstances, and with the appliances then known; and adding to this remainder the interest on it from the time when the oil ought to have been produced to the time of the trial: *Bradford Oil Co. v. Blair* (1886), 113 Pa. 83.

A lessee under an oil lease, may not conduct the natural gas away from the land and appropriate it to his own use: *Kitchen v. Smith* (1882), 101 Pa. 452; *contra*, *Wood County Petroleum Co. v. W. Va. Transportation Co.* (1886), 28 W. Va. 210.

A grant of land "for the purpose of prospecting, boring, digging, drilling, pumping and otherwise searching for and obtaining oil, salt and other minerals thereon," reserving to the grantor one-fourth of all the oil produced, does not convey a fee, but only a right to work the land for oil, salt and other minerals; and the sub-grantees are bound by any conditions as to the control of the majority, that they may impose: *Thompson's Appeal* (1882), 101 Pa. 225.

But a lessee who has the possession of the land under an oil lease, has more than a mere license, and can recoup or recover taxes from the lessee under the Pennsylvania Act of April 3, 1804: *Kitchen v. Smith* (1882), 101 Pa. 452.

A lease was granted by the owner of land for the purpose of boring salt-wells and manufacturing salt, so long as the salt-well contemplated in the lease, should be carried on by the lessee or his assigns, under certain provisions for a forfeiture, for a rent of every twelfth barrel of salt manufactured. After a time, oil rose with the salt-water, which, though first allowed to run to waste, was collected and sold. The owner of the land claimed the oil, and brought

trover for it. It was held that trover would not lie, although the oil was his, for he had not the right of possession at the time of conversion by the lessee, either of the oil itself or of the land from which it flowed; but the proper remedy was a bill in equity for an account, the measure of damage being the value of the oil at the instant of separation from the freehold. It was shown that the lessee could not raise the salt-water without raising the oil with it: *Kier v. Peterson* (1862), 41 Pa. 357.

A reservation, "expressly reserving one-eighth of the oil produced from the land, to be divided between" the lessor and lessee "on the land," means one-eighth of the oil *raised to the surface* by the grantee, and that the grantor is entitled to his share without deduction for the expense in producing it: *Union Oil Company's Appeal* (1883), 3 Penny. (Pa.) 504.

An agreement to lease land for a term of years, with the exclusive right to bore for and collect oil, giving one-fourth to the lessor, passes a corporeal interest; and the lessee's taking of his share of the oil found is not waste, but a rightful act, unless the lease be forfeited by its own terms: *Chicago, etc., Oil and Mining Co. v. U. S. Petroleum Co.* (1868) 57 Pa. 83.

An agreement was made, giving a license to mine on land for oil, and a lease for ten years in case of a successful discovery. The lessor lost all rights thereunder by lapse of time, not having discovered oil within the time limited by the contract. The lessor then agreed to refrain from declaring a forfeiture, if the lessee would carry on the search for petroleum constantly and without cessation. It was held that the latter agreement was conditional; that its condition was suspension; and that when the lessee ceased to carry on

search for oil, the lessor was entitled to declare the forfeiture of the contract by suit, and claim possession of the lands without a formal putting in default. The Court declined to decide whether sulphur was a "similar product," under a contract based particularly upon the expectation of finding petroleum: *Escoubos v. Louisiana Petroleum and Coal Oil Co.* (1870), 22 La. An. 280.

A lease, purporting to be a grant or license to take oil, drawn by an ignorant scrivener, at a time when the nature or value of the mineral was not known, should be construed with reference to the subject-matter, and the knowledge of such subject-matter at the time; and as to its inartificial use of technical language, the whole scope of the paper is to be considered: *French v. Brewer* (1861), U. S. Circ. Ct., W. Dist., Pa., 3 Wall. Jr. 346.

A lease, dated May 19, 1881, gave "the right to take, bore and mine for and gather all oil or gases found in and upon the premises, to have and to hold the same for the term of twelve years from this date, or as long as oil is found in paying quantities," the lessor to receive one-eighth of the oil produced and saved from the premises. The lessee covenanted "to commence operations for said mining purposes, and prosecute the same on some portion of the above described premises within two years from this date, or thereafter pay to the lessor [blank] dollars per [blank] until work is commenced. This lease shall be null and void, and at an end, unless the lessee shall, within six months from this date, commence and prosecute, with due diligence, unavoidable accidents excepted, the sinking and boring of one well on or in the vicinity of this lease, to a depth of 1200 feet, unless oil in paying quantities is sooner found. * * * If the lessee fail to keep and perform the covenants and

agreements by him to be kept and performed, then this lease shall be null and void, and surrendered to the lessor."

Within six months from the date of the lease, the lessee drilled a well 1200 feet deep finding natural gas at a depth of 1045 feet in large quantities, and some oil, but not in paying quantities, at 1093 feet. The lessee used the gas for fuel in drilling the well, but not in any other manner. In the fall of 1882, the lessee removed his engine, etc., leaving the casing in the well, and ceased to carry on mining operations. In February, 1884, the lessor released the premises to T., who assigned such lease to the defendant company, for the same purpose, pursuant to which they entered into possession of the same and collected and sold the gas.

The lessee in the first lease brought an action to restrain the lessee, and his assignee, in the second lease, and their common lessor, from interfering with, or appropriating to their own use, the gas therein. It was held that there was no covenant in the lease which required the first lessee to continue the boring of oil wells upon the premises until oil was obtained in paying quantities, under a penalty of forfeiting his rights by a failure so to do; that the covenant requiring him to commence and prosecute operations for mining purposes within two years from the date of the lease, or thereafter pay to the lessor [blank] dollars per [blank] until work was commenced, was void for uncertainty, by reason of the blanks which were left in the vital and essential parts thereof; that if a clause, that the lessor was to have one-eighth of the gas, had been omitted by mistake, the contract could be re-formed and the clause inserted, so as to express the intention of the parties; that if it now expressed their intention, they must abide by it; that the claim (that the first lease had expired by reason of its own terms, as the provision

that the lessee should "have and hold the same for the term of twelve years from this date, or so long as oil is found in paying quantities," limited the terms to that period, during which oil was found in paying quantities) was not well founded, and that the term fixed was for twelve years, and as much longer as oil was found in paying quantities: *Eaton v. Wilcox* (1886), 42 Hun (N. Y.) 61.

A. leased land to B., with an oil well partly bored thereon. B. agreed to sink this well deeper, and to pay A. a royalty of one-fourth of all oil obtained from it. Both parties supposed the well was situated on the leased premises; but it was afterwards discovered that such was not the case. Then B. offered to deliver possession of the premises leased, and refused to pay the royalty. It was held that a court of equity, on a bill to account, would not order an account; the action should have been brought at law. B. was not in a position to deny A.'s right to the royalty, and if an accounting was allowed, it would not be a bar to an action at law for the royalty: *Mays v. Dwight* (1876), 82 Pa. 462.

B. leased of A. certain oil lands. No rent was reserved, and no term of the demise stated. B. agreed in the lease, to put down a well to a depth of 600 feet, by a certain date; upon a failure to do so, a right of entry was reserved to the lessor. B. did not sink the well. The lessor sued to recover for the breach. It was held that if B. had dug the well, it would have been his as well as the product thereof; and that the lessor could only recover nominal damages for the breach, and not what it would cost to sink such a well. The lease was construed to be a perpetual one to B., if he sank the well and kept the covenants of the demise: *Chamberlain v. Parker* (1871), 45 N. Y. 569.

A mining lease, for a term certain,

saving only to the lessor the right of tillage, is exclusive, and the lessor cannot mine himself within the tenement: *Baker v. Dale* (1870), 3 Pitts. (Pa.) 190.

Land was leased exclusively for the purpose of producing oil, boring to be commenced within ten days, and continued with due diligence until success or abandonment; and a failure to get oil in paying quantities, or a cessure of work for thirty days at any time, amounted to a forfeiture of the lease. It was held that if the lessee failed to get oil in one well, he had a right to put down another, and as many more as he pleased, so long as he worked with diligence to success or abandonment; and that a cessation of work for thirty days forfeited the lease: *Munroe v. Armstrong* (1880), 96 Pa. 307.

In October, 1875, B. agreed with S. that the latter should, for a term of fifteen years, have the right to enter upon and use the lands of the former so far as might be necessary to enable him to bore for oil, reserving to B. the one-eighth of all oil produced. Unless S. should commence boring the said well within nine months from the date of the contract, it was "to become void and cease to be of any binding effect." This contract was recorded and assigned to the defendant, who entered upon the land and at once commenced to bore a well, in February, 1877. In September, 1876, B., who had remained in possession of the land and in no way waived, extended or qualified the fulfillment of the contract, executed another and similar lease to M. and others, conferring upon them the exclusive right to dig and bore for oil on the farm for the term of twelve years, which lease was recorded in January, 1877. [The reported decision says "1876," but this is evidently a clerical error.] M. and his co-lessees assigned their lease to the plaintiff, who, within the time therein

specified, entered upon the land and commenced to bore a well. The plaintiff sued the defendant, his assignees and B., to procure a judgment declaring the S. lease forfeited and annulled, and to restrain the defendants from entering upon the land or boring therein for oil. The Court held that even though the lease appeared upon its surface to have become void by reason of the failure of the lessee to commence operations within the time limited by it, and though the act of the defendant in thereafter entering upon the land was a mere trespass, yet as the controversy related to the sinking of oil wells in land, in violation of rights therein claimed by the plaintiff, a court of equity would grant relief by injunction; that as B. continued at all times to occupy the land, it was not necessary that he should re-enter or give any notice of his intention to enforce the forfeiture occasioned by the neglect of the lessees to commence operations within the time limited; that even if any overt act or notice was required, the execution and delivery of the new lease to M. was a sufficient declaration of his election to enforce the forfeiture; and that the defendant could not show that after the execution and delivery of the lease to M., B. consented to his entering upon the land: *Allegheny Oil Co. v. Bradford Oil Co.* (1880), 21 Hun (N. Y.) 26; affirmed (1881), 86 N. Y. 638.

A court will not decide, unaided by expert evidence, that natural gas is included in a lease of the right to mine "for petroleum, rock or carbon oil, or other valuable volatile substances:" *Ford v. Buchanan* (1886), 111 Pa. 31.

The assignment of a leasehold interest, including engines, boilers, tanks, tubing, derricks, and all other fixtures and personal property situated upon and appertaining thereto, does not transfer oil in tanks at the well: *Dresser v. Transportation Co.* (1875), 8 W. Va. 553.

A. leased to B. 223 acres for the sole and only purpose of mining and excavating for gas and oil, for twenty years, or as long as oil or gas should be found on the premises in paying quantities within that period. The lessee agreed to commence operations upon one well within ninety days, and to prosecute the work "actively, diligently and continuously," and to complete the same on or before a day named, "and upon failure to do so within the time herein prescribed, to pay the party of the first part the sum of \$10000 annually, in advance," etc. It was declared that upon a failure by the lessee to keep the covenants of the lease, that "such failure to perform, or breach of the said covenant, shall work an absolute forfeiture of this grant or lease, and the privileges or easements hereby given shall absolutely cease, determine, and become null and void." The Court held that the lessee could not terminate the lease by breach of the covenants, and the lessor might or might not terminate it, on such breach, at his pleasure: *Wills v. Manufacturers' Natural Gas Co.*, decided in the Supreme Ct. of Pa., Nov. 11, 1889.

Measure of Damage on a Contract to Dig an Oil or Gas Well.

A. contracted to sink an oil well within twelve months, or pay \$25 per annum until work commenced. In an action for this sum, it was held to be a good defense, except as to nominal damages, that the contract was founded on a mutual mistake as to the existence of oil on the lands: *Bell v. Truitt* (1872), 9 Bush (Ky.) 257.

If the contract is to dig a well a certain depth and of a certain width, digging one of the required depth, but of a narrower width, is not a compliance with the contract; and there can be no recovery, even if no gas is found, although the one dug was as effectual in determining whether gas could there be found

as the wider one: *Gillespie Tool Co. v. Wilson* (1888), 123 Pa. 19.

Grant of Exclusive Use of Streets.

[Beyond compensation for the additional burden upon the land used as a street (*supra*, page 105), the greater question arises of the power to secure the exclusive right to lay pipes.

As a result of many authorities upon this subject, it may be stated that a town or city, without power expressly conferred upon it by statute, cannot grant to a natural or artificial gas company, or one incorporated to furnish water, the right to an exclusive use of its streets, for the purpose of laying pipes therein, and supplying the inhabitants with gas or water; and if it does do so, it may, without danger of liability, disregard the grant and give other and similar companies, such privileges. If the town or city is empowered to grant such exclusive use by statute, or the legislature grant such an exclusive privilege; and the privilege or use is accepted by the company, and expenditures are made in pursuance thereof, the grant becomes a contract, which cannot be revoked, either by the city or the legislature.

[These statements are sustained and illustrated by the following cases:

Municipal Grant.

[Such grants are void, because the general rule of law denies to municipal corporations, the power to create monopolies: *ELLIOTT, J., Citizens G. & M. Co. v. Town of Etwood* (1887), 114 Ind. 332, 336. *Ill. & St. L. R. R. & C. Co. v. City of St. Louis* (1872), U. S. Circ. Ct., E. Dist. Mo., 2 Dill. 70 (grain elevated); *Davenport v. Kleinschmidt* (1887), 6 Mont. 502, 529 (water supply).

["The exercise of such power may be convenient, but that is not sufficient; it must be essential and indispensable

to the powers expressly granted, or to the declared objects and purposes of the corporation. * * * It is certainly not essential, or necessarily incident to the power, expressly granted, 'to lay off streets,' etc., 'and light the same,' that the city should delegate to a private individual, or corporation, the exclusive right to furnish such light, and use the streets for that purpose. To justify such a construction, it must appear that in no other proper, or reasonable manner, could the city provide light for its streets and inhabitants." SNYDER, J., *Parkersburg Gas Co. v. City of Parkersburg* (1887), 30 W. Va. 435, 440.

[Where municipalities are authorized to grant the privilege of using the streets, no arbitrary authority is thereby conferred, but their action must be by an ordinance which is general in its nature and impartial in its operation, and which does not grant a special privilege to any company: ELLIOTT, J. *Citizens G. & M. Co. v. Town of Elwood* (1887), 114 Ind. 332, 338.

[In this case, a statute of Indiana (approved March 7, 1887, Laws, p. 36) provides—"SECTION 1. *Be it, etc.,* That the Boards of Trustees of towns, and the Common Councils of cities in this State, shall have power to provide by ordinance, reasonable regulations for the safe supply, distribution and consumption of natural gas, within the respective limits of such towns and cities, and to require persons or companies, to whom the privilege of using the streets and alleys of such towns and cities is granted, for the supply and distribution of such gas, to pay a reasonable license for such franchise and privilege."

Municipal Revocation.

[If an exclusive grant is made, the municipality may subsequently make another grant to another company, with impunity; the first grant being a contract beyond the power of the munici-

pality: *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.* (1888), U. S. Circ. Ct., W. Dist. Mich., 33 Fed. Repr. 659, 667, 677.

Municipal Contracts.

[If the contract is not warranted by the city charter, the city councils have, at all times, the right to declare it void and to refuse compliance with it: *Brenham v. Brenham Water Co.* (1887), 67 Texas 542, 553.

[Subject to legislative interference (see below), a contract with a coal gas company, properly entered into, will bind the municipality, upon informal renewal: *Taylor v. Lambertville* (1887), 43 N. J. Eq. 107, before BIRD, V. C. And may be modified by subsequent contracts: *City of St. Louis v. St. Louis G.-L. Co.* (1879), 70 Mo. 69; s. c., 5 Mo. App. 484.

[If a municipality refuses to take and pay for coal gas, it would probably be liable in damages: ADAMS, C. J., *Scarf v. Abraham* (1887), 73 Iowa 507.

[Where a city charter gave authority to the common council to provide, by ordinance, "for a supply of water for said city," and an ordinance was duly passed for a contract, and the contract contained a stipulation to pay an annual sum for fire purposes, the city was bound to pay for the water supply under the terms of the contract. It was no defense that the contract was to be continued as long as the company performed its part, because the authority to contract in this manner could not be denied to the city, under another section of its charter, requiring taxation for defraying the expense of water supply to be annual: *Atlantic City W. W. Co. v. Atlantic City* (1886), 48 N. J. Law 378.

Additional Light.

[There is a strong current of authorities to the effect that an exclusive contract for lighting the streets by coal gas, is not infringed by granting permission

to an electric light company to light the streets, stores and houses: the question is interesting as showing the limits upon exclusive grants by municipalities. Upon the abstract question of more light, these authorities are not necessarily conclusive: *Parkersburg Gas Co. v. The City of Parkersburg* (1887), 30 W. Va. 435, 442; *Saginaw G.-L. Co. v. The City of Saginaw* (1886), U. S. Circ. Ct., E. D. Mich., 28 Fed. Repr. 529, 538.

Legislative Revocation.

[Where a municipality was authorized by statute, to contract with a coal gas company, for the lighting of the streets, and made a contract for five years, this contract could be terminated by the repeal of the statute within the five years: *Richmond Co. Gaslight Co. v. Middletown* (1874), 59 N. Y. 228, 232. The same ruling was made in the case of a ten year contract which the municipality afterwards repudiated: *Garrison v. City of Chicago* (1877), U. S. Circ. Ct., N. Dist. Ill., 7 Biss. 480; and a twenty-five year contract, on intervention of the State, by *quo warranto*: *The State, ex rel. v. Cin. G. L. & C. Co.* (1868), 18 Ohio St. 262.

Legislative Grant.

[The legislature may confer upon a private corporation, the exclusive right to furnish coal gas to the citizens of a municipality; and in such cases, the legislative right to supervise and control, remains, unless clearly given up in a constitutional manner: *State v. Milwaukee G. L. Co.* (1872), 29 Wis. 454, 460, 462; *The State, ex rel. v. Columbus G. L. & C. Co.* (1878), 34 Ohio St. 572; *City of Memphis v. The Memphis Water Co.* (1871), 5 Heisk. (Tenn.) 495, 530.

[Such privilege is a franchise which can only emanate, directly or indirectly, from the sovereign power of the State: SCOTT, J. *The State, ex rel. v. Cin. G. L. & C. Co.* (1868),

18 Ohio St. 262, 291; *Hamilton G.-L. Co. v. The City of Hamilton* (1889), U. S. Circ. Ct., S. Dist. Ohio, 37 Fed. Repr. 832, 837; *Saginaw G.-L. Co. v. City of Saginaw* (1886), U. S. Circ. Ct., E. Dist. Mich., 28 Fed. Repr. 529, 535, 536.

[This right was denied, as creating a monopoly, in the early coal gas case of *Norwich Gas Light Co. v. Norwich City Gas Co.* (1856), 25 Conn. 19. But all doubt has since been removed by subjecting such contracts to the police power of the State, while upholding their sanctity, when otherwise valid: *New Orleans Water Works Co. v. Rivers* (1885), 115 U. S. 674; *New Orleans Gas-Light Co. v. La. Light & Heat P. & M. Co.* (1885), Id. 650; *Louisville Gas Co. v. Citizens' G.-L. Co.* (1885), Id. 683; *St. Tammany Water Works Co. et al. v. New Orleans Water Works Co.* (1886), 120 U. S. 64; *The Binghampton Bridge* (1865), 3 Wall. (70 U. S.) 51, 81.

Exclusive Right of Way.

[In the case of the *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* (1883), 22 W. Va. 600, the grant of an exclusive use of a tract of land, for a pipe and telegraph line, was held to be void, as contrary to public policy and imposing an unreasonable restraint upon trade, by preventing others from transporting oil from or through the land.

Restricting the Transportation of Natural Gas.

Natural gas, when brought to the surface, and placed in pipes for transportation, is an article of commerce, and the legislature cannot enact a law forbidding its transportation beyond the limits of the State: *State, ex rel. Corwin, v. Indiana & Ohio O. G. & M. Co.*, decided by the Supreme Court of Indiana, November 6, 1889.

W. W. THORNTON.

Indianapolis, Ind.

Supreme Court of the United States.

ILLINOIS C. R. R. CO. ET AL. V. BOSWORTH ET AL.

The confiscation of a person's real estate, as enemy property, by proceedings *in rem*, under the Statute of July 17, 1862, puts the fee in abeyance—*in nubibus*; but if the former owner be pardoned as a personal offender, the fee reverts in him.

Proceedings *in rem*, against enemy property, are personal, and for the punishment of offenders guilty of treason and rebellion.

In error to the Circuit Court of the United States for the Eastern District of Louisiana.

James Fentress, Thomas J. Semmes, and Girault Farrar, for plaintiffs in error.

E. H. Farrar and E. B. Kruttschnitt, for defendants in error.

BRADLEY, J., January 20, 1890. This was an action brought by Millard Bosworth and Charles H. Bosworth, only surviving children of A. W. Bosworth, deceased, to recover possession of one undivided sixth part of a certain tract of land in New Orleans, which formerly belonged to their said father.

The petition states that the latter having taken part in the war of the Rebellion, and done acts which made him liable to the penalties of the Confiscation Act of July 17, 1862, the said one-sixth part of said land was seized, condemned, and sold under said act, and purchased by one Burbank in May, 1865; that the said A. W. Bosworth died on the 11th day of October, 1885; and that the plaintiffs, upon his death, became the owners in fee-simple of the said one-sixth part of said property, of which the defendant, the Illinois Central Railroad Company, was in possession.

The company filed an answer, setting up various defenses; among other things, tracing title to themselves from the said A. W. Bosworth, by virtue of an act of sale executed by him and his wife, before a notary public, on the 23d day of September, 1871, disposing of all their interest in the premises, with full covenant of warranty. They further allege that said Bosworth had, before said act of sale, not only been included in the general amnesty proclamation of the president, issued on the 25th of December, 1868, but had received a special pardon on the 2d of October, 1865, and had taken the oath of allegiance, and complied with all the terms and conditions

necessary to be restored to, and reinvested with, all the rights, franchises, and privileges of citizenship.

The parties, having waived a trial by jury, submitted to the Court an agreed statement of facts in the nature of a special verdict, upon which the Court gave judgment in favor of the plaintiffs. To that judgment the present writ of error is brought.

Those portions of the statement of facts which are deemed material to the decision of the case are as follows, to-wit—

1st. The plaintiffs, Millard Bosworth and Charles H. Bosworth, are the only surviving legitimate children of Abel Ware Bosworth, who died intestate in the city of New Orleans on the 11th day of October, 1885, and have accepted his succession with benefit of inventory.

2nd. By act before Edward Barnett, notary, on the 25th day of April, 1860, Abel Ware Bosworth purchased from H. W. Palfrey and others a one-third undivided interest in fee-simple title and full ownership in and to the property described in the petition of the plaintiffs in this cause.

3rd. On the breaking out of the war between the States, Abel W. Bosworth entered the Confederate Army, and bore arms against the Government of the United States from about March, 1861, until April, 1865.

4th. Under and by virtue of the Confiscation Act of the United States, approved July 17, 1862, and the joint resolution contemporary therewith, the said property was seized by the proper officer of the United States, and on the 20th day of January, 1865, a libel of information was filed against the said property as the property of A. W. Bosworth, in the District Court of the United States for the Eastern District of Louisiana. Into these proceedings intervened Mrs. Rachel Matilda Bosworth, wife of said Abel Ware Bosworth, to protect her community interests in said property, and, after due proceedings had, the said Court entered a decree of condemnation as to A. W. Bosworth, and a decree in favor of Mrs. Rachel Matilda Bosworth, recognizing her as the owner of one-half of said one-third undivided interest in and to said property. A *venditioni exponas*, in due form of law, issued to the marshal for the sale of said property under said decree, and at said sale "all the right, title, and interest of A. W. Bosworth in and to the one undivided third part of said property" (reserving to Mrs. Rachel M. Bosworth her rights therein, as per order of the Court), was adjudicated on the — day of the month of May, 1865, to E. W. Burbank, for the price and sum of \$1,700, and the marshal executed a deed in due form of law to said Burbank for the same.

6th. That on the 2nd day of October, 1865, Andrew Johnson, President of the United States, granted to said A. W. Bosworth a special pardon, a duly certified copy of which, together with the written acceptance by said Bosworth thereof, is hereto annexed, made part of this statement of facts, and marked "Document A."

7th. That on the 23rd day of September, 1871, by act before Andrew Hero, Jr., notary public, the said A. W. Bosworth and Mrs. Rachel Matilda Bosworth, his wife, sold, assigned, and transferred to Samuel H. Edgar, with full warranty, under the laws of Louisiana, all their right, title, and interest in and to the said property, including the one-sixth undivided interest claimed in this suit by the plaintiffs and

described in the petition, for the price and sum of eleven thousand six hundred and sixty-six two-third dollars.

8th. That on the 18th day December, 1872, the said E. W. Burbank, by act before the same notary, transferred all his right, title, and interest, in the nature of a quitclaim to S. H. Edgar aforesaid, for the price and sum of five thousand one hundred dollars.

9th. That the said S. H. Edgar, by act executed before Charles Nettleton, a duly authorized commissioner for Louisiana, in New York City, on the 10th day of October, 1872, and duly recorded in the office of the Register of Conveyances for the parish for Orleans, on the 30th day of October, 1872, sold and transferred the same property, with full warranty under the laws of Louisiana, unto the New Orleans, Jackson & Great Northern Railroad Company.

10th. That by various transfers made since said date, as set forth in the answers filed in this suit, the said property has come into the possession of the Chicago, St. Louis & New Orleans Railroad Company, who has leased the same to the Illinois Central Railroad Company, which said company holds said property under said lease.

14th. It is further agreed, as a part of this statement of facts, that the President of the United States, on the 25th day of December, 1868, issued a general amnesty proclamation, and the terms of said proclamation, as found in the Statutes at Large of the United States, are made part of this statement of facts.

The following is a copy of the special pardon (Document A) referred to in the statement of facts, and of the written acceptance thereof, to-wit—

"Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting :

"Whereas, A. W. Bosworth, of New Orleans, Louisiana, by taking part in the late Rebellion against the Government of the United States, has made himself liable to heavy pains and penalties; and, whereas, the circumstances of his case render him a proper object of executive clemency :

"Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons to me thereunto moving, do hereby grant to the said A. W. Bosworth a full pardon and amnesty for all offenses by him committed, arising from participation, direct or implied, in the said Rebellion, conditioned as follows :

"1st. This pardon to be of no effect until the said A. W. Bosworth shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865.

"2d. To be void and of no effect, if the said A. W. Bosworth shall hereafter at any time acquire any property whatever in slaves, or make use of slave labor.

"3rd. That the said A. W. Bosworth first pay all costs which may have accrued in any proceedings instituted or pending against his person or property before the date of the acceptance of this warrant.

"4th. That the said A. W. Bosworth shall not, by virtue of this warrant, claim any property, or the proceeds of any property, that has been sold by the order, judgment, or decree of a court under the confiscation laws of the United States.

"5th. That the said A. W. Bosworth shall notify the Secretary of State, in writing, that he has received and accepted the foregoing pardon.

"In testimony whereof, I have hereunto signed my name, and caused the seal of the United States to be affixed. Done at the City of Washington this second day of October, A. D. 1865, and of the independence of the United States the ninetieth.

"ANDREW JOHNSON.

"By the President: WILLIAM H. SEWARD,
[Seal.] Secretary of State."

"Washington, D. C., October 5th, 1865.

Honorable William H. Seward, Secretary of State.

"Sir: I have the honor to acknowledge the receipt of the President's warrant of pardon, bearing date October 2nd, 1865, and hereby signify my acceptance of the same, with all the conditions therein specified. I am, sir, your obedient servant,

"A. W. BOSWORTH."

The proclamation of general amnesty and pardon, issued on the 25th day of December, 1868, referred to in the last article of the statement of facts, is found in volume 15, pp. 711, 712, Statutes at Large. After referring to several previous proclamations, it proceeds as follows, to-wit—

"And whereas, the authority of the Federal Government having been re-established in all the States and Territories within the jurisdiction of the United States, it is believed that such prudential reservations and exceptions, as at the dates of said several proclamations were deemed necessary and proper, may now be wisely and justly relinquished, and that a universal amnesty and pardon for participation in said Rebellion extended to all who have borne any part therein, will tend to secure permanent peace, order, and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people, and their respect for and attachment to the National Government, designed by its patriotic founders for the general good.

"Now, therefore, be it known that I, Andrew Johnson, President of the United States, by virtue of the power and authority in me vested by the Constitution, and in the name of the sovereign people of the United States, do hereby proclaim and declare unconditionally, and without reservation, to all and to every person who, directly or indirectly, participated in the late insurrection or Rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof."

The principal question raised in the present case, is whether, by the effect of the pardon and amnesty granted to A. W. Bosworth by the special pardon of October, 1865, and the general proclamation of amnesty and pardon of December 25, 1868, he was restored to the control and power of disposition over the fee-simple, or naked property in reversion expectant upon the termination of the confiscated estate in the property

in dispute. The question of the effect of pardon and amnesty on the destination of the remaining estate of the offender, still outstanding after a confiscation of the property during his natural life, has never been settled by this Court. That the guilty party had no control over it, in the absence of such pardon or amnesty, has been frequently decided: *Wallach v. Van Riswick* (1875), 92 U. S. 202; *Chaffraix v. Schiff* (1875), Id. 214; *Pike v. Wassell* (1876), 94 Id. 711; *French v. Wade* (1880), 102 Id. 132; and see *Avegno v. Schmidt* (1885), 113 Id. 293; *Shields v. Schiff* (1888), 124 Id. 351. But it has been regarded as a doubtful question what became of the fee, or ultimate estate, after the confiscation for life.

"We are not, therefore, called upon," said Justice STRONG, in *Wallach v. Van Riswick*, "to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States, or in the purchaser, subject to be defeated by the death of the offender:" 92 U. S. 212.

It has also been suggested that the fee remained in the person whose estate was confiscated, but without any power in him to dispose of or control it.

Perhaps it is not of much consequence which of these theories, if either of them, is the true one; the important point being that the remnant of the estate, whatever its nature, and wherever it went, was never beneficially disposed of, but remained (so to speak) in a state of suspended animation. Both the common and the civil laws furnish analogies of suspended ownership of estates which may help us to a proper conception of that now under consideration. Blackstone says—

"Sometimes the fee may be in abeyance, that is (as the word signifies) in expectation, remembrance, and contemplation in law, there being no person *in esse* in whom it can vest and abide, though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est heres viventis*; it remains, therefore, in waiting or abeyance during the life of Richard:" 2 Bl. Comm. 107.

In the civil law, the legal conception is a little different. Pothier says—

"The dominion of property (or ownership), the same as all other rights, as well *in re* as *ad rem*, necessarily supposes a person in whom the right subsists, and to whom it belongs. It need not be a natural person; it may belong to corporations

or communities, which have only a civil and intellectual existence or personality. When an owner dies, and no one will accept the succession, this dormant succession (*successione jacente*) is considered as being a civil person, and as the continuation of that of the deceased; and in this fictitious person subsists the dominion or ownership of whatever belonged to the deceased, the same as all other active and passive rights of the deceased; *hereditas jacens personæ defuncti locum obtinet*." Droit de Domaine de Propriété, cc. 1, 15.

But, as already intimated, it is not necessary to be over curious about the intermediate state in which the disembodied shade of naked ownership may have wandered during the period of its ambiguous existence. It is enough to know that it was neither annihilated, nor confiscated, nor appropriated to any third party. The owner, as a punishment for his offenses, was disabled from exercising any acts of ownership over it, and no power to exercise such acts was given to any other person. At his death, if not before, the period of suspension comes to an end, and the estate revives and devolves to his heirs at law.

In *Avegno v. Schmidt* (1885), 113 U. S. 293, and in *Shields v. Schiff* (1888), 124 Id. 351, this Court held that the heirs of the offender, at his death, take by descent from him, and not by gift or grant from the government. They are not named in the confiscation act, it is true, nor in the joint resolution limiting its operation. The latter merely says—

"Nor shall any punishment or proceedings under said act, be so construed as to work a forfeiture of the real estate of the offender, beyond his natural life."

The Court has construed the effect of this language to be, to leave the property free to descend to the heirs of the guilty party: *Bigelow v. Forrest* (1870), 9 Wall. (76 U.S.) 339; *Wallach v. Van Renswick* (1875), 92 U. S. 202, 210. Mr. Justice STRONG in the latter case, speaking of the constitutional provision that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted (which provision was the ground and cause for passing the joint resolution referred to), said—

"No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone,—a declaration that the children should not bear the iniquity of the fathers."

But although the effect of the law was to hold the estate, or naked ownership, in a state of suspension for the benefit of the

heirs, yet they acquired no vested interest in it; for, until the death of the ancestor, there is no heir. During his life it does not appear who the heirs will be. Heirs apparent have, in a special case, been received to intervene for the protection of the property from spoliation: *Pike v. Wassell* (1880), 94 U. S. 711. This was allowed from the necessity of the case, arising from the fact that the ancestor's disability prevented him from exercising any power over the property for its protection or otherwise, and no other persons but the heirs apparent had even a contingent interest to be protected.

It would seem to follow, as a logical consequence from the decision in *Avegno v. Schmidt* and *Shields v. Schiff*, that after the confiscation of the property, the naked fee (or the naked ownership, as denominated in the civil law), subject, for the life-time of the offender, to the interest or usufruct of the purchaser at the confiscation sale, remained in the offender himself; otherwise, how could his heirs take it from him by inheritance? But by reason of his disability to dispose of or touch it, or affect it in any manner whatsoever, it remained as before stated, a mere dead estate, or in a condition of suspended animation. We think that this is, on the whole, the most reasonable view. There is no corruption of blood. The offender can transmit by descent; his heirs take from him by descent. Why, then, is it not most rational to conclude that the dormant and suspended fee has continued in him?

Now, if the disabilities which prevented such person from exercising any power over this suspended fee, or naked property, be removed by a pardon or amnesty,—so removed as to restore him to all his rights, privileges, and immunities, as if he had never offended, except as to those things which have become vested in other persons,—why does it not restore him to the control of his property so far as the same has never been forfeited, or has never become vested in another person? In our judgment, it does restore him to such control. In the opinion of the Court in the case of *Ex parte Garland* (1867), 4 Wall. (71 U. S.) 333, 380, the effect of a pardon is stated as follows, to wit—

“A pardon reaches both the punishment prescribed for the offense, and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots

out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation,—it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment."

The qualification in the last sentence of this extract, that a pardon does not affect vested interests, was exemplified in the case of *Semmes v. U. S.* (1875), 91 U. S. 21, where a pardon was held not to interfere with the right of a purchaser of the forfeited estate. The same doctrine had been laid down in the *Confiscation Cases* (1874), 20 Wall. (87 U. S.) 92, 112, 113. It was distinctly repeated and explained in *Knote v. U. S.* (1877), 95 U. S. 149. In that case, property of the claimant had been seized by the authorities of the United States, on the ground of treason and rebellion; a decree of condemnation and forfeiture had been passed, the property sold, and the proceeds paid into the Treasury. The Court decided that subsequent pardon and amnesty did not have the effect of restoring to the offender the right to these proceeds. They had become absolutely vested in the United States, and could not be divested by the pardon. The effect of a pardon was so fully discussed in that case, that an extract from the opinion of the Court will not be out of place here. The Court say—

"A pardon is an act of grace, by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense that afterwards it cannot be imputed to him, to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender, in his person by imprisonment, forced labor, or otherwise. It does not give compensation for what has been done or suffered, nor does it impose upon the Government any obligation to give it. The offense being established by judicial proceedings, that which has been done or suffered while they were in force, is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offense, or which have been acquired by others while that judgment was in force. If, for example, by the judgment, a sale of the offender's property has

been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. * * * So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. * * * Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the executive, or of officers subject to his orders, or are in the custody of the judicial tribunals; the property will be restored or its proceeds delivered to the original owner, upon his full pardon."

The last portion of the above extract was justified by the decision in the case of *Armstrong's Foundry* (1868), 6 Wall. (73 U. S.) 766, where a pardon was received by Armstrong, after his foundry had been seized, and while proceedings were pending for its confiscation. He was even allowed to plead the full pardon as new matter in this Court, while the case was pending an appeal; and the Court held, and decided, that this pardon relieved him of so much of the penalty as accrued to the United States, without any expression of opinion as to the rights of the informer.

The citations now made, are sufficient to show the true bearing and effect of the pardon granted to Bosworth, and of the general proclamation of amnesty as applied to him. The property in question had never vested in any person, when these acts of grace were performed. It had not even been forfeited. Nothing but the life-interest had been forfeited. His power to enjoy or dispose of it, was simply suspended by his disability as an offender against the Government of the United States. This disability was a part of his punishment. It seems to be perfectly clear, therefore, in the light of the authorities referred to, that when his guilt and the punishment therefor were expunged by his pardon this disability was removed. In being restored to all his rights, privileges, and immunities, he was restored to the control of so much of his property and estate as had not become vested either in the Government or in any other person; especially that part or quality of his estate which had never been forfeited, namely, the naked residuary ownership of the property, subject to the usufruct of the purchaser under the confiscation proceedings.

This result, however, does not depend upon the hypothesis that the dead fee remained in Bosworth after the confiscation

proceedings took place. It is equally attained if we suppose that the fee was *in nubibus*, or that it devolved to the Government for the benefit of whom it might concern. We are not trammelled by any technical rule of the common or the civil law on the subject. The statute, and the inferences derivable therefrom, make the law that controls it. Regarding the substance of things, and not their form, the truth is simply this: A portion of the estate, limited in time, was forfeited. The residue, expectant upon the expiration of that time, remained untouched,—undisposed of; out of the owner's power and control, it is true, but not subject to any other person's power or control. It was somewhere, or possibly nowhere. But if it had not an actual, it had a potential existence, ready to devolve to the heirs of the owner upon his death, or to be revived by any other cause that should call it into renewed vitality or enjoyment. The removal of the guilty party's disabilities, restoration of all his rights, powers and privileges, not absolutely lost or vested in another, was such a cause. Those disabilities were all that stood in the way of his control and disposition of the naked ownership of the property. Being removed, it necessarily follows that he was restored to that control and power of disposition.

It follows, from these views, that the act of sale executed by A. W. Bosworth and his wife in September, 1871, was effectual to transfer and convey the property in dispute, and that the judgment of the Circuit Court in favor of the plaintiffs below (the defendants in error) was erroneous. That judgment is therefore reversed and the cause remanded, with instructions to enter judgment for the defendants below, the now plaintiffs in error.

BLATCHFORD, J., did not sit in this case, or take any part in its decision.

The statement of facts in the opinion shows that the proceedings against A. W. Bosworth's property were civil proceedings, *in rem*, against it as enemy property under the Act of July 17, 1862 (12 Stat. at Large 589). The opinion, however, treats them as criminal proceedings, *in personam*, against Bosworth

himself (father of the defendants in error), for the crime of treason or rebellion; repeatedly speaks of him as an "offender," and of the civil confiscation as a "punishment;" and it concludes that the personal pardon of the condemned offender operates the restoration to him of the fee simple of his real

estate from whatever effect the *actio in rem* had had upon it.

In *Bigelow v. Forrest* (1870), 9 Wall. (76 U. S.) 339, proceedings *in rem*, under the act, were first treated as *in personam*; the civil action against enemy property, as a criminal one to punish for treason; and it was held that the children of French Forrest could recover after his death, because "the punishment inflicted upon him, is not to descend to his children;" because "the forfeiture of the land of the offender was * * * without any corruption of his heritable blood," etc.

McVeigh v. United States (1871), 11 Wall. (78 U. S.) 259, is the next important case, growing out of a confiscation proceeding *in rem*, in which the Supreme Court took a similar view of the condemnation of enemy property under the act. They treated the proceedings as though they had been a personal criminal trial of McVeigh himself, and discussed his "criminality," "guilt," "offenses," etc., though he had not been indicted, arrested, or tried in that civil case against his property as enemy property, which the act authorized.

In *Miller v. United States* (1871), 11 Wall. (78 U. S.) 292, the Supreme Court took the opposite view of proceedings under the act. They held that, though the first four sections of the statute related to personal criminal proceedings for treason, the second four, under which the confiscation was decreed, were confined to civil proceedings *in rem*, against enemy property only, under the law of nations. The *res* was personal property, in the proceedings which the Court was reviewing; but in the closely following case of *Tyler v. Defrees* (1871), 11 Wall. (78 U. S.) 331, which was concerning land as the *res*, the Court took the same view, and said of the Confiscation Act of 1862, which it was expounding, that it was "designed to introduce the principle of confiscating

enemy property, seized on land, like that seized on water." And further: The Constitution imposes "no restriction upon the power to prosecute war, or confiscate enemy's property." Mr. Justice FIELD (with whom CLIFFORD and DAVIS, JJ., then concurred, though the last assented to the judgment in the *Tyler* case) dissented in both these cases, and contended that the proceeding was personal, criminal and unconstitutional, because it was not preceded by indictment and arrest. The majority of the court, basing the proceedings on the confiscation sections of the act only, left the joint resolution, explanatory, out of consideration, since that was expressly confined to "forfeiture" as a "punishment" of the "offender," confining it to his "natural life" in nearly the same terms used in the Constitution relative to personal trials for the crime of treason.

Brown v. Kennedy (1873), 15 Wall. (82 U. S.) 591, is substantially in accord with the two foregoing decisions, and there was no dissent, except that of FIELD, J.

In the next case, *Day v. Micou* (1874), 18 Wall. (85 U. S.) 160, which involved the confiscation case of *U. S. v. Two Squares of Ground* [in the U. S. District Court at New Orleans, where certain land of Judah P. Benjamin was condemned], the Court discussed the question, "What was the *res*?" in that proceeding, and held that the fee of the land had not been condemned, and allowed a mortgagee, who had been defaulted for non-appearance in that proceeding, to foreclose after condemnation. The answer of the Court to its own question, deduced from the decision, was that the land, *minus* the lien upon it, was the *res*.

The next cases, *U. S. v. Stidell's Land*, and *U. S. v. Conrad's Lots*, called by the reporter, "*The Confiscation Cases*" (1874), 20 Wall. (87 U. S.) 92-117, were against the theory that the pro-

ceedings under the Act were personal and criminal. The Court held, in these, that "the liability of property" was the only subject of inquiry; that "no judgment was possible against any person;" that "the enactment of Congress was that the property belonging to any one embraced within several classes of persons, should be subject to seizure and condemnation;" that "persons were referred to *only to identify the property*;" that "reference to ownership was the mode selected for designating that which was made liable to confiscation;" that "everything necessary to a common law [sic] proceeding *in rem*, is found in the record;" that it was not necessary "to conclude against the statute" because that form is "inapplicable to civil proceedings."

There was nothing in these decisions in accord with *Ill. Cent. R. R. Co. v. Bosworth*—nothing favoring the doctrine that the proceedings *in rem* were *in personam*, and nothing in common with *Day v. Micou* (1874), 18 Wall. (85 U. S.) 160, except the *dictum* that intervention should not have been allowed, the Supreme Court overlooking, for the moment, that just such interventions were expressly authorized by statute. (U. S. Rev. Stat., § 5322; Act of March 3, 1863, 12 Stat. 762.)

As to the question of the fee, the Court said that by the decree of confiscation, "the United States succeeded to the position of Slidell, whatever that was;" that is, if he had held the fee before the confiscation (which he had), the United States held it afterwards. And in the very next confiscation case, *Semmes v. United States* (1875), 91 U. S. 21, the Court said: "Properties condemned as forfeited to the United States, under the aforesaid Act of Congress [that of July 17, 1862, under which all the cases were brought, as well as the one under review], become the property of the United States from the date of the

decree of condemnation: 12 Stat. 591, Sec. 7. Judgment of forfeiture was rendered in this case on the 5th of April, 1865, and the land in question became, from that date, the property of the United States; * * * the title to the land was lost to him [Semmes] when it became vested in the United States. * * Beyond doubt, the original decree of the District Court was complete and correct. * * * Such proceedings, under the Confiscation Act in question, are justified as an exercise of belligerent rights against a public enemy, and are not, in their nature, a punishment for treason. Consequently, confiscation being a proceeding distinct from, and independent of, the treasonable guilt of the owner of the confiscated property, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights, as against a purchaser in good faith and for value." The Supreme Court were unanimous in this decision, and these quoted utterances, and the cases of *Miller v. U. S.* and *The Confiscation Cases*, *supra*, were cited and relied upon. Respecting intervention, they said the intervener "would have been remediless had he not reconvened."

But *Osborn v. United States* (1875), 91 U. S. 474, on the subject of pardon, antagonizes the case of *Semmes*, though both are in the same volume. Admitting that "the confiscation law of 1862 is construed to apply only to public enemies," the Court said, in close proximity (though not in close logical connection), that Osborn's pardon covered "the offenses for which the forfeiture of his property was decreed." (p. 477.) * * * "The pardon of that offense necessarily carried with it the release of the penalty attached to its commission. It is of the very essence of a pardon that it releases the offender from the consequence of his offense." And there are other like expressions. (Opinion by

FIELD, J.) How could one be constitutionally convicted and punished without information or indictment, personal arrest, trial by jury, etc., as he had contended could not be done, when dissenting in the *Miller and Tyler* cases, *supra*?

Next comes *Wallach v. Van Riswick* (1875), 92 U. S. 202, in which it was held that all the "estate and property" of Wallach was condemned as "enemy property," nothing was left in him. "It is incredible that Congress, while providing for the confiscation of an enemy's land, intended to leave in that enemy a vested interest therein, etc. The description [in the act] of property thus made liable to seizure, is as broad as possible. It covers the estate of the owner, all his estate or ownership. No authority is given to seize less than the whole." And the Court quote from the act, that the property seized "shall be condemned as enemies' property and become the property of the United States," adding: "Nothing can be plainer than that condemnation and sale of the identical property seized, was intended by Congress, and it was expressly declared that the seizure ordered should be of all the estate and property of the persons designated in the act."

This case was much like the one under review. Van Riswick had acquired the title of Wallach, as well as that of the United States—just as the plaintiffs in error, in the present case, have done. But the Court held that Wallach had nothing to convey, and that his "heirs" could take (by inheritance?) after his death, notwithstanding his deed to Van Riswick. For, though holding, on the one hand, that the confiscation proceedings were civil, *in rem*, against enemy property, not any person, the Court held, on the other, that the Joint Resolution Explanatory was applicable to the proceedings as criminal, *in personam*, against Wallach himself and

not against his property. As to the fee, they now expressly declined to say whether it had been in the United States or the purchaser, after confiscation. Therefore, between the dates of decree and sale, it must have been in the United States, according to this deliverance. Nothing was said about its possibly being in abeyance, or *in nubibus*, as in the present case. But the Court certainly held, in the *Wallach* case, that the fee was out of him, by the confiscation. That case was briefly re-affirmed in *Chaffrais v. Schiff* (1875), 92 U. S. 214.

Passing *Windsor v. McVeigh* (1876), 93 U. S. 274, and *Gregory v. McVeigh* (1876), Id. 284, which followed the criminal theory, and held (contrary to established international law), that an enemy has judicial standing in a court while yet fighting to destroy it, we come to *Pike v. Wassel* (1876), 94 U. S. 711, confessedly modeled on the *Wallach* case. The Court said that the confiscation of Pike's land, "without any doubt, vested it in the United States, or the purchaser," at the Government sale; and that Pike's creditors could not make their money out of any property right left in Pike to that land. The reason given in the *Wallach* case, that if the fee had been left in the enemy, he might yet use it to further rebellion against the Government, was inapplicable to the position of creditors who sought to make their money. If the fee was *in nubibus*, that circumstance would weigh against the innocent creditors, presumably loyal, and in favor of the enemy debtor. Hiding one's effects *in the clouds* to defeat attachment, is something novel. If the land itself had not been confiscated, but only an uncertain, precarious usufruct, as the Court now say, why should it not have remained liable to execution for Pike's debts immediately, with reservation of the usufructuary right? The "abeyance," which the Court recognizes

in the case under review, would have saved Bosworth from his creditors till he got his pardon, and left him exposed to them afterwards.

Annot. v. United States (1877), 95 U. S. 149: The effect of pardon, as to the proceeds of confiscated property covered into the treasury, was the point of this decision; and it was held that the pardoned enemy could not recover it, though the criminal theory was re-avowed.

In *Burbank v. Conrad* (1877), 96 U. S. 291, the theory that the confiscation proceedings *in rem* were criminal proceedings *in personam*, prevailed; and the Court departed from the rule in *The Confiscation Cases*, *Stidell's Land* and *Conrad's Lots*, *supra*, and now held that the naming of the enemy owner in the libel, is not merely to describe the property proceeded against, but to make him a party; and that if the *res* belonged to another, the latter would not be "remediless," should he fail to intervene, as had been held unanimously in the *Semmes* case. But in *Burbank v. Semmes* (1878), 99 U. S. 138 (the next case on the subject), the opposite theory prevails; the Court follow the statute; the proceedings are held to have been civil, against property, etc.

French v. Wade (1880), 102 U. S. 132, was almost precisely like the case now under review. Wade's land was confiscated and sold, and French acquired the Government's title, and also bought whatever right remained in Wade—just as the Railroad Co. bought both titles in the Bosworth land. The facts of these two cases, and *Wallack v. Van Ristwick*, run together on all fours. The Court said: "By the condemnation and sale, Wade's estate was separated entirely from that of his heirs after his death, and the heirs are not estopped, by his warranty, from asserting their title."

I do not know what that means.

Nemo plus commodi heredi suo relinquit quam ipse habuit.

The Court said: "As to him, the forfeiture was complete and absolute; but the ownership after his death was in no wise affected, except by placing it beyond his control while living." If "the forfeiture was complete and absolute," how could Wade, holding the price of the fee in his pocket, yet have the fee simple title stored away in the clouds, to be brought down to him at death, or on being pardoned for a personal crime? And if the "forfeiture was complete," etc., how can the heirs take from him "by inheritance," as the Court said they did, in this very case? If, "as to him," the forfeiture was complete, as to everybody else it must have been so, since it is conceded that he had held the fee, and no other rights appear in any one else.

In *Kirk v. Lynd* (1882), 106 U. S. 315, where the condemnation was under the Act of 1861 (12 Stat. at Large 319), the Court distinguished between that Act, and the Act of 1862 (12 Stat. at Large 589), and held that the fee had been confiscated because the property had been *used* for hostile purposes, while under the latter Act, property is proceeded against because of its having the enemy character, and therefore it was concluded that the object was to *punish* the enemy as an offender. The proceedings under both confiscation statutes were *in rem*, as both required: but the Court did not see that the Government's *jus in re* arises from the enemy character of property, as clearly as from the hostile use of property. Examples may be given in prize proceedings *in rem*. A professedly neutral ship, caught *in delicto*—running a blockade for instance—is condemned for hostility done by a thing, while a ship captured in mid ocean, may be condemned, if an enemy vessel, though nothing hostile has been done in, with, or by it. This principle

was recognized in *Semmes v. U. S.* *supra*, and other cases above noticed. This oversight of the Supreme Court, as to the *jus in re*, was the pebble that turned the stream of decisions the wrong way, and caused the Court to treat civil proceedings as criminal; proceedings *in rem* as *in personam*; confiscation of enemy property under the law of nations limited by statute, as a prosecution for the punishment of an offender, whether citizen or alien. This is all virtually acknowledged by the Court in *Kirk v. Lynd*.

In *Avegno v. Schmidt* (1885), 113 U.S. 293, and *Shields v. Schiff* (1888), 124 Id. 351, the Court followed the *Wallack*, *Pike* and *French* cases, and held that nothing was left in the former enemy owner (or "offender," as their theory has it), which he could convey by deed, will, or in any way, with no reference to the effect of their previously received pardons for treason. They held, under the authority of *Day v. Micou*, and *Marcuard's Intervention*, that the default of a mortgagee, and final judgment as *res adjudicata* (*quoad omnes*) was of no effect—contrary to *Semmes v. U. S.* on the same point, as well as in the teeth of the statute above cited.

In this last case, *Ill. Cent. R. R. Co. v. Bosworth's Heirs*, the criminal theory is reiterated; some twenty different times the Court applies criminal terms to Bosworth, (though he may have been an alien not capable of treason, so far as the record shows) and to the civil proceedings against his property (charged in the libel as enemy property), such terms as "offenders," "offense," "conviction," "punishment," "pardon," etc., etc., are repeatedly employed; but the point of the decision is that the fee of confiscated property, under the Act of 1862, is in abeyance till the "offender" (the bereft enemy), be dead or pardoned, when it becomes vested in him or his heirs, *eo instanti*.

General pardon was granted to all who had committed the crimes of treason and rebellion, by proclamation in 1868, which is printed in the opinion: why then could not all living persons, who had had lands confiscated under the Act of 1862, immediately have power to sell or devise the fee, subject to the life usufruct awarded by the Supreme Court to the purchaser? Why, from that date, could not creditors attach the interest of such a person for debt, in a suit against him?

It is well settled that pardon is personal and does not affect property forfeited as a fictitiously guilty thing, or confiscated as a fictitiously hostile thing, by proceedings *in rem*—against *it*. The Supreme Court, to take Bosworth's land out of the general rule, had to treat the four confiscation sections of the Act of 1862, as providing for the conviction of traitors without indictment, arrest, jury or any personal trial, in order to make the Joint Resolution apply. But *quere?* Are we now to understand that the constitutional provision, requiring a personal trial for treason, is abrogated? It would seem that the questions touching the whereabouts of the fee simple of confiscated property, are themselves *in nubibus*. It is clear enough, however, that the Court was right in reversing the decision below, for the railroad company, which bought the property from Edgar, who had bought of Burbank, (the purchaser of the property at the confiscation sale), had acquired the ownership of it: *Miller v. U. S.* (1871), 11 Wall. (78 U. S.) 292; *Tyler v. Defrees* (1871), Id. 331; *Semmes v. U. S.* (1875), 91 U. S. 21; *Confiscation Cases* (1874), 20 Wall. (86 U. S.) 92; all of which (the Court still cites with approval,) sustain confiscation.

RUFUS WAPLES.

Ann Arbor, Mich.

ABSTRACTS OF RECENT DECISIONS.

ACCIDENT INSURANCE.

Marks of extreme violence, apparently recently inflicted, upon the back of a person who is insured by an accident policy, and whose injuries ultimately produce death, constitute *prima facie* evidence of death resulting from bodily injuries "through external, violent and accidental means." *Cronkhile v. Travelers' Ins. Co.*, S. Ct. Wis., Nov. 5, 1889.

ADMIRALTY.

Maritime lien, created by a collision, takes precedence of liens for repairs and supplies, although the latter liens arose prior to the collision, *The John G. Stevens*, U. S. C. Ct., S. D. N. Y., Oct. 31, 1889.

Steam dredge, which is a floating scow fitted with appliances for deepening channels of navigation, is a subject of admiralty jurisdiction. *Aitcheson v. The Endless Chain Dredge*, U. S. D. Ct., E. D. Va., Oct. 17, 1889.

AGENCY.

Real estate agent is not entitled to a commission upon the price of a property sold by the owner to a purchaser not procured by such agent, unless the agent has been given an exclusive right to sell the property. *Dole v. Sherwood*, S. Ct. Minn., Nov. 1, 1889.

BILLS AND NOTES.

Material alteration of a promissory note by a joint maker, after another joint maker has signed it, and without his consent, will render the note void as to the latter. *Flanigan v. Phelps*, S. Ct. Minn., Dec. 20, 1889.

Purchaser of a promissory note, who has knowledge that it was given in a speculative wheat deal, is not a *bona fide* holder for value. *Goodrich v. McDonald*, S. Ct. Mich., Nov. 8, 1889.

CHATTEL MORTGAGES.

Mortgagee, who takes the mortgaged goods into his possession after a default, but tenders them back upon payment of the debt, is not required to deliver them to the mortgagor upon his own premises, but the latter must take them at the place where the mortgagee has stored them for safe-keeping. *Gale Mfg. Co. v. Phillips*, S. Ct. Mich., Nov. 15, 1889.

CHECKS.

Certification of check is not constituted by a verbal statement of the bank, upon which it is drawn, that it is good and will be paid. *Farmers' and Traders' Bank v. Bank of Allen Co.*, S. Ct. Tenn., Dec. 19, 1889.

CONSTITUTIONAL LAW.

City ordinance in regard to meat inspection, providing that the animal must be inspected before slaughtering, and must be slaughtered within one mile of the city limits, the effect of which is to exclude dressed meat brought from a distance, is void, as interfering with free commerce between the States. *Ex parte Kieffer*, U. S. C. Ct., D. Kan., Nov. 28, 1889.

Dentists may be required by a State statute to obtain a certificate from a board of examiners, as a pre-requisite to continuing practice within the State; such requirement is a proper exercise of the police power of the State and is not unconstitutional. *Gosnell v. State*, S. Ct. Ark., Nov. 9, 1889.

Limited Liability Act of June 19, 1886, which extended the benefit of limited liability legislation to vessels engaged in inland navigation, is valid, in view of the power of Congress to regulate commerce. *The Katie*, U. S. D. Ct., S. D. Ga., Nov. 12, 1889.

CORPORATIONS.

Foreign corporation, by its failure to comply with the statutory conditions entitling it to do business in a State, does not render a conveyance to it of property located in such State void, so that it may be attacked collaterally by a private person. *Fritts v. Palmer*, S. Ct. U. S., Nov. 25, 1889.

CRIMINAL LAW.

Forgery is constituted by a letter, falsely purporting to come from the owner of a diploma and requesting the custodian of such diploma to deliver it to bearer, the alleged forger. *Alexander v. State*, Ct. App. Tex., Nov. 9, 1889.

FIRE INSURANCE.

Notice of loss was requested by the insured to be given to the company by the local agent the day after the fire, but the agent replied that he had already sent notice, in consequence of which statement the insured did not notify the company; the notice sent by the agent, which did not purport to be given on behalf of the insured, was duly received by the company; the requirement of the policy as to notice was sufficiently complied with. *Loeb v. American Cent. Ins. Co.*, S. Ct. Mo., Nov. 18, 1889.

INTERSTATE COMMERCE LAW.

Refusal to transport stock in the cars of a certain live-stock transportation company at the same rate as in the cars of another such company, when the railroad has different contracts with the two companies and can use the cars of the latter to its own better advantage, is not an "unjust discrimination" within the meaning of the Interstate Commerce Act. *U. S. v. Delaware, L. & W. R. R. Co.*, U. S. C. Ct., N. D. N. Y., Oct. 18, 1889.

JURISDICTION.

Federal courts have no jurisdiction of proceedings *in rem*, taken under a State statute against the property of a non-resident defendant, who has not been personally served or appeared. *Harland v. United Lines Tel. Co.*, U. S. C. Ct., D. Conn., Nov. 14, 1889.

"*No Man's Land*," so-called, is subject to the criminal jurisdiction of the United States Court for the Eastern District of Texas. *In re Jackson*, U. S. C. Ct., D. Kan., Nov. 28, 1889.

Suit to set aside sale of lands forfeited to a State, the parties being citizens of different States, is within the jurisdiction of the Federal

courts, and a deed for such lands, although made in pursuance of the order of the State court, may be avoided by the former tribunals. *De Forest v. Thompson*, U. S. C. Ct., D. W. Va., Nov. 14, 1889.

LIFE INSURANCE.

Agent of insurance company, after being informed by an applicant for a policy that he held certificates of membership in certain co-operative societies, told him that such certificates were not considered insurance, and wrote, in answer to the question whether the applicant had any other insurance on his life, "no other;" the policy contained a condition rendering it void, if any of the statements in the application were untrue; the act of the agent in making such answer was the act of the company, and the latter was estopped from alleging that insurance in co-operative societies was insurance of the kind to which the question referred. *Continental Life Ins. Co. v. Chamberlain*, S. Ct. U. S., Nov. 25, 1889.

Mutual benefit society is subject to the same rules of law in the interpretation of its contracts as a mutual life insurance company, in the absence of any statutory distinction. *Block v. Valley Mut. Ins. Asso.*, S. Ct. Ark., Nov. 9, 1889.

LIMITATION.

Adverse possession will not affect the holder of a certificate of purchase of land from the United States, until his patent is issued, as his right to maintain ejectment against one wrongfully in possession of the land does not accrue until the issuance of the patent. *Redfield v. Parks*, S. Ct. U. S., Nov. 18, 1889.

PUBLIC LANDS.

Timber, unlawfully severed from public mineral lands and purchased by a railroad company for use upon its locomotives and cars, can be recovered for in a suit by the United States against the railroad. *U. S. v. Eureka & P. R. R. Co.*, U. S. C. Ct., D. Nev., Nov. 23, 1889.

RAILROADS.

Driving for two miles on a railroad track, after entering it upon a crossing which was maintained by the railroad company in a negligent manner, is such contributory negligence as will excuse the latter from liability for injuries sustained by the person so driving, and the drunkenness of the person thus injured will not affect the question of his negligence. *McDonald v. Chicago, M. & St. P. Ry. Co.*, S. Ct. Wis., Nov. 5, 1889.

Look-out for stock upon its track need not be kept by a railroad company; the extent of its duty is that the engineer shall use reasonable care, after the stock is discovered by him, to prevent injury to it. *Memphis & L. Ry. Co. v. Kerr*, S. Ct. Ark., Nov. 2, 1889.

REMOVAL OF CAUSES.

Extension of time to answer beyond the limit expressly provided in a State statute, does not extend the time to file a petition for removal to the Federal Court. *Velie v. Manufacturers' Accident Indemnity Co.*, U. S. C. Ct., E. D. Wis., Dec. 18, 1889.

Local prejudice is not sufficiently established, under the Act of Congress of March 3, 1887, by an affidavit of the party, stating that he has reason to believe and does believe that he will not be able to obtain justice in the State Court. *Minnick v. Union Ins. Co.*, U. S. C. Ct., W. D. Mich., Nov. 26, 1889.

TAXATION.

Real estate owned and occupied by a school, which is incorporated under an Act "empowering the creation of corporations to establish, maintain and conduct a seminary of learning," the only business of such corporation being the maintenance of such a seminary, with the usual studies pursued, and its expenses being met by tuition charges, is not taxable under an Act which exempts such real estate of "scientific institutions" as is occupied by them for the purposes for which they were incorporated; nor does the fact that on one occasion the institution declared a dividend, remove the exemption, as the remedy, if this was a misuse of its funds, would be by a direct proceeding to restrain and punish the corporate abuse, and not by taxation. *Detroit Home and Day School v. City of Detroit*, S. Ct. Mich., Oct. 18, 1889.

TELEGRAPHS.

License tax cannot be imposed by a municipality upon a telegraph company engaged in interstate commerce, and an ordinance which imposes upon such company license fees amounting to more than four times the annual cost of supervising and controlling its wires and poles for the protection of property and person, is unreasonable and levies a tax, and is consequently void. *City of Philadelphia v. Western Union Tel. Co.*, U. S. C. Ct., E. D. Pa., Oct. 28, 1889.

Mental suffering, caused by the failure of a telegraph company to deliver a message, will not of itself support an action for damages. *Rowell v. Western Union Tel. Co.*, S. Ct. Tex., Nov. 5, 1889.

WILLS.

Direction to executors to provide for the maintenance of the daughter of the testatrix during her minority, and thereafter to pay her yearly a certain sum until she attains the age of thirty-five, also to manage the estate until she attains that age and then transfer it to her absolutely, followed by a provision that, in case of the daughter's death prior to attaining that age, the property shall go to her issue upon the same trusts, and upon their death to the husband of testatrix, if he is then living, vests in the daughter an absolute estate, free from trusts, immediately upon the death of the husband, although she has not at that time reached the age of thirty-five. *Bennett v. Chapin*, S. Ct. Mich., Nov. 8, 1889.

Lapse of legacy to one who dies in the life-time of the testator, will not be prevented by the legatee bequeathing to his wife "all my estate that is coming to me from" the first testator, although it is shown that the latter intended the widow to take what had been originally bequeathed to her husband. *Dixon v. Cooper*, S. Ct. Tenn., Oct. 26, 1889.

JAMES C. SELLERS.

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LEGAL HOLIDAYS.

I. DEFINITIONS.

Notwithstanding the distinction drawn by the great American Lexicographer, between a holiday and a holyday, whereby the latter should be used as the proper term for a religious festival, while the former should rather denote a day of exemption from labor and of amusement, joy and gaiety, the common impression seems to liken both the holiday and the holyday to the great weekly day of rest and legal inaction. It is not improbable that this confusion of thought has arisen from the distinctively religious character of many established holidays, together with the more or less complete disestablishment of State religion, in the United States. How this may occur, may be surmised from a quotation:

There are, it is said, two kinds of Holidays, ecclesiastical and state; the former established by the church, the latter by the state. In this country we cannot recognize the ecclesiastical holidays, for we have no established church, and affairs of state are carefully separated from ecclesiastical matters: *Elliott J. Hadley v. Musselman* (1885), 104 Ind. 462.

It is no longer true that a holiday, as established by law, is, as described by Milton and quoted by Noah Webster, that day, in law or meteorology, when—

Young and old come forth to play,
On a sunshine holiday.

Nor that of Richardson—

Holi-day—a day of rest. [*c. g.*] The same bell that called the great man to his table, invited the neighborhood all around, and proclaimed a *holiday* to the whole country. (*Hurd. Dial. Age of Elis.*)

Dr. Worcester indicates the true definition in words which need supplementing, in legal language, though still adhering to that distinction of Noah Webster which is the only reliable guide to a correct solution of the practical problem, as to what may be done upon an American Legal Holiday.

The holidays are considered, in England, to be those days, exclusive of Sundays, on which no regular public business is transacted at public offices. They are either fixed, or variable. The variable are seven, viz: Ash Wednesday, Good Friday, Easter Monday and Tuesday, Holy Thursday, Whit Monday and Tuesday.

The course of correct understanding is barred, however, to many of the legal fraternity, by the unfortunate definitions of the Law Dictionaries. Thus Bouvier, after quoting Webster, as above, concludes

A legal holiday is, *ex vi termini, dies non juridicus*: Rawle's Bouvier, vol. 1, p. 753, citing *Lampe v. Manning* (1875), 38 Wis. 673.

A recent writer is more commendable:

A secular day, on which the law exempts all persons from the performance of contracts for labor, or other personal services, from attendance on court, and from attention to legal proceedings: Anderson.

However, this last definition does but accord with two less popular of the dictionaries, and is not correct in principle; thus—

A day of exemption from labor; a day of amusement; a day, or number of days, during which a person is released from his every-day labours: Ogilvie, ed. 1882, Vol. 2, p. 514.

A day of freedom from labour; a day of joy and gaiety: Stormonth, ed. 1885, p. 451.

Benjamin Vaughan Abbott's Dictionary of Terms and Phrases (1879), gives an imperfect definition, but also explanatory notes of much value—

A secular day, upon which the usual obligations of labor, attendance upon court, and attention to notices and service in legal proceedings, are, by law, remitted.

The important thing is that the days in question are excepted, by common understanding, and without express reservation, from many contracts for labor; the business of courts and public offices suspended; presentment of commercial paper and service of legal notices and civil process is disallowed or excused; and, in general, the law, while it does not require, encourages the appropriation of the day to rest and festivity.

In a sense, Sunday is a holiday; but, as the latter word is usually employed, it does not include Sundays; thus *Sundays and holidays*, is a common and correct expression.

The decision cited by the editor of Bouvier does not sustain the definition. As this case is frequently cited in this short and ready way, it is, in that view, worthy of examination. An action had been tried before a justice of the peace, on the twenty-third day of February, 1874, which was Monday. The Statute of Wisconsin (*infra*), distinctly forbade the opening of any court for trial on that day, being a legal holiday. The judgment of the justice was necessarily reversed and it was mere *dicta*, for the Justice of the Supreme Court to add, that the justice would have had no authority to try the case on that day, being a holiday, or *dies non juridicus*, even though the express prohibition of the Statute had been omitted. The result of such *dicta* is the line of decisions, where the courts are driven to distinguish legal business from lay business, along the shadowy lines of acknowledgements, depositions and similar unsolemn legal Acts. The true definition depends upon the Statutes, loosely worded and erroneously drawn as they are.

At common law, Sunday was deemed a non-juridical day, during which no courts could transact any business, or render any decree. Of course, at common law, some of the days which, under our practice, are deemed non-juridical, were unknown as such; and when they are so declared, the inference would be that the prohibition extends no further than is named in the statute: Drummond, J. *In re Worthington*, (1877), U. S. Circ. Ct. W. Dist., Wis. 7 Biss. 455, 456.

This avoidance of such construction as would render a legal holiday statute almost equivalent to a Sunday law, received strong endorsement in New Jersey, whose statutes (*infra*) prohibit compulsory labor and court sessions. A summons issued, tested, and served on a general election day, was upheld, MAGIE, J., saying—

The statutory declaration that these days shall be legal holidays, does not indicate an intent to assimilate their *status* to that of Sunday. "Holiday," in its present,

conventional meaning, is scarcely applicable to Sunday: *Phillips v. Innes* (1837), 4 Clark & F. 234. It is applicable to all, and has long been applied to some of the days named. When the statute declares them to be legal holidays, it does not permit a reference to the legal *status* of Sunday to discover its meaning; for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment, declaring what shall be done thereon. What it thus expresses, is prohibited; what it fails to prohibit, remains lawful to be done. The plain intent of the statute, therefore, is to free all persons, upon the days named from compulsory labor, and from compulsory attendance on courts, as officers, suitors, or witnesses. * * * Any person, officers of courts, or others, may work, if they choose: *Glenn v. Eddy*, S. Ct. N. J., March 11, 1889.

The definitions of the adjective *Legal*, should here be observed—

2. Authorized, sanctioned, or permitted by law; according or conformable to law; as, "A legal marriage." 3. Instituted, prescribed, or required by law; lawful; as, "The legal rate of interest." 4. Created, or constituted by law; as, "The exceptions must be confined to legal crimes" (Paley): Worcester, ed. 1880, p. 827.

According to law; required, authorized or permitted by law; good or valid in law; lawful; the opposite of *illegal*: Burrill, ed. 1859, vol. 2, p. 139.

Allowed or authorized by law; as legal holiday: Anderson.

The term *dies non juridicus* should here be observed. The lexicographers translate it thus—

A day on which courts are not held, as the Sabbath, etc.: Webster.

No day in court; a day on which the judges do not sit: Worcester.

Not a court day: Wharton.

Non-judicial days. Days during which courts do not transact any business; as Sunday, or the legal holidays: Rawle's Bouvier, vol. 1, p. 530.

A day not juridical: not a court day. A day on which courts are not open for business, such as Sundays and some holidays. [Not] a day for judicial proceedings, or legal purposes: Burrill, ed. 1859, vol. 1, p. 490.

A non-judicial day, [which] means only that process ordinarily cannot issue, be executed, or returned, and that courts do not sit, on that day. It does not mean that no judicial action can then be had: Anderson.

The last definition is a portion of the language of RODMAN, J., in *State v. Ricketts* (1876), 74 N. C. 187, 193, where receiving a verdict on Sunday in a prosecution for perjury, was held valid, because—

In this State, in general, every act may lawfully be done, unless there be some act of the Legislature forbidding it to be done on that day.

Notwithstanding the definitions and remarks of judges, just quoted, the Supreme Court of California was called upon to decide that Washington's Birthday was not a legal holiday

until made so by enactment: *McVerry v. Boyd* (1881), 57 Cal. 406. Still earlier, the Supreme Court of the United States was called upon to decide whether a consignee might refuse to take a consignment upon the State Fast-day. There was no statute, and in compelling the consignee to accept the delivery of a cargo on that day, GRIER, J. said—

The proclamation of the governor is but a recommendation. It has not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary, and not of compulsion, and [the] holiday is a privilege and not a duty. In almost every State in the Union, a day of thanksgiving is appointed in the fall of the year by the governor, because there is no ecclesiastical authority which would be acknowledged by the various denominations. It is an excellent custom, but it binds no man's conscience nor requires him to abstain from labor. Nor is it necessary to a literal compliance with the recommended fast, that all labor should cease, and the day be observed as a Sabbath, or as a holiday. It is not so treated by those who conscientiously observe every Friday as a fast day: *Richardson v. Goldard* (1859), 64 U. S. 28; s. c. (in Circ. Ct.) 6 AMER. LAW REGISTER (O. S.) 504.

The aim of this article is to correct the error of confounding Sunday with a legal holiday. A reference to other articles, treating of the legal relations of Sunday (17 AMER. LAW REGISTER 281; 19 Id. 137, 209, 273), will assist in leading up to a proper distinction between the two classes of days. Sunday has a sanctity from of old and all the statutes have attempted to do for its observance has been in the nature of police regulation. Legal holidays have, however, to be created, excepted, defined and separated from other days, and often the difficulty of creating and regulating at the same time, has led to an approximation, by convenient reference, of penalties for not observing legal holidays to those of Sunday. In this view, it would be strange if hasty thinkers did not confuse the legal effect of the two classes of days.

Legal Holidays, as distinguished from the first day of the week, are those days which are set apart by statute, or by executive authority, for fasting and prayer, or thanksgiving, or other religious observances and commemorations, or for political, moral, or social duties or anniversaries, or merely for popular recreation and amusement, under such penalties and prohibitions alone as are expressed in positive legislative enactments.

II. JUDICIAL PROCEEDINGS.

In judicial proceedings, the happening upon a holiday, of a last day for performance of any act, generally results in the liberty to perform on the next judicial day. Not that the last, it may be, of many intervening holidays shall be expunged; not that the law prohibits the performance on that day; not that the act could not be expected to be performed in advance, even one day; construction must divide between commercial usage, which deducts a day, and legal usage, which adds a day in pleading. Enlarging the rule respecting pleas in abatement, (*Lee v. Carlton*, 1790, 3 Term Rep. 642), all the latter days must be *law days*, that the full number allowed may not be diminished, even though other nonjudicial days, occurring earlier in the period, are computed: *Avery v. Stewart* (1816), 2 Conn. 69 (a Sunday case upon the time of tender of merchandise); *Sands v. Lyon* (1846), 18 Id. 18 (a Sunday case upon the time of tender to obtain a devise); *Estate of Rose* (1883), 63 Cal. 346 (appeal taken on next day). This addition of time in Pennsylvania, is made the subject of a special statute, which commands the omission of a legal holiday, in the computation time, when the last day would fall upon a holiday: *vide infra*.

Exception to the general statement above, must be made in applying the bar of the Statute of Limitations; that is a statute of repose and its bar does not suffer delay by the mere occurrence of a nonjudicial day. In this respect, commercial usage for the payment of notes on the day before, and legal construction of the statute of repose, coincide in fact, though not in principle. For the principle here involved is that of the reasonable construction of a statute according to the probable intention of the legislature in limiting the performance of a particular act. Nonjudicial days are necessarily included and are not excepted; reasonably, by construction, there was no such intention to except them: *Thayer v. Felt* (1826), 4 Pick. (Mass.) 354 (a Sunday case).

This exception was declared in *The Hibernia S. & L. Soc. v. O'Grady* (1874), 47 Cal. 574.

The extension of the legal holiday to some other day, when it falls upon Sunday, is not favored by the courts. When the

statute is so uncertain as to require construction, the objects of such a day are to be set against the interference with private rights. The first day of the week is for rest and opportunity of devotion, but a holiday is set apart by law for the commemoration of some event, or for respect to some persons, or for the expression of gratitude, and the like. These are often not at all inconsistent with the objects of Sunday, and the courts should not assume that a separate day would be required: MAXWELL, J., *State v. King* (1888), 23 Neb. 540, 547; DRUMMOND, J. *In re Worthington, supra*.

Even where the statute distinctly transfers the holiday, falling on Sunday, to the following Monday, there has been a disposition to so construe it as to confine the prohibitions upon court sessions and the like, to the actual day, being Sunday, and uphold judicial proceedings upon the Monday: *State v. King* (1888), 23 Neb. 540.

A summary of the various statutory regulations, of judicial and ministerial proceedings, on a legal holiday, appears at the conclusion of this article, with references to the pages where the various points are discussed in the course of this article.

The statutes which transfer a holiday falling upon Sunday, to the following Monday, are in accord with that principle which prevents a court from losing jurisdiction over a case by an adjournment, or return of process to a nonjudicial day. In such case, the case stands continued to the next day: MAXWELL, J., *State v. King* (1888), 23 Neb. 547; and a formal adjournment to Thanksgiving Day must be treated as a nullity, so that practically there is a recess to the next law day: *Polin v. State* (1883), 14 Neb. 540, 546.

The sittings of the courts and performance of judicial duties by the judges will not be prevented by liberal construction of statutes closing public offices; the construction of the words used, is, to take them in their ordinary and familiar signification and import and with regard to their general and proper use.

Hence a criminal examination, begun upon the day before a legal holiday, continued and partially held upon the holiday, and finally concluded upon the next day, was sustained and

the commitment held to be valid: *Hamilton v. The People* (1874), 29 Mich. 175, 176.

Hence, words closing public offices, do not prevent judicial action by judges: *People v. Kearney* (1888), 47 Hun. (N. Y.) 129, 134.

Under the Texas Statutes (*infra*), the prohibition against the issuance and service of processes, was not extended, by construction, to the avoidance of a sheriff's sale held on a legal holiday, because the prohibition was found alone in the chapter regulating the commencement of suits, and not in that on executions: *Crabtree v. Whiteselle* (1885), 65 Tex. 111, 113, 114.

If the prohibition upon legal action upon a holiday, is the same as upon a Sunday, then no one is under any obligation to regard a judgment or other judicial action, and no failure to appeal or otherwise have the erroneous action corrected, can affect even the same parties, in another action over the same subject matter: *Hemmens v. Bentley* (1875), 32 Mich. 89, 90; S. C. 14 AMER. LAW REGISTER 703. The case here cited was one before a magistrate for a statutory penalty; a plea of former recovery was denied because the former action had merged into judgment entered on the twenty-third day of February, a legal holiday. (Otherwise in New York; *infra*, 145).

Similarly where an insolvent debtor selected a fast-day for the appointment of justices to hear his disclosure, and the creditor did not appear, the refusal of the creditor to appear either at the appointment or at the adjournment to the next day, when the disclosure was made, was sustained; the justices could not be selected on such a day, and their action on the law day to which they had adjourned, was void: *Poor v. Beatty* (1887), 78 Maine 580, 583, WALTON J., significantly adding—

We think the creditor cannot be compelled thus to spend Fast-day. There is no necessity for it.

The prohibition of judicial action upon an election day will not be construed further than the statute declares; thus, a local election will not prevent the sittings of the Supreme Court, which are forbidden on the day of a general election:

Re Election Laws (1845,) 7 Hill (N. Y.) 194. Even on the day of a general election, the entry of a judgment by a justice of the peace, in a cause tried and submitted on a previous day, has been upheld: *Rice v. Mead* (1862), 22 How. Pr. (N. Y.) 445, 448, BALCOM, J. (of Supreme Court), saying—

The only motive the legislature could have had, in enacting the statute under consideration, was to close the courts on general election days, so that no elector should be hindered or kept from voting, by them, unless guilty of an offence, or of threatening to commit one. The object they must have had in view, is accomplished when all courts are stopped from transacting any business, on such days, of a civil nature, that requires the attention of any party, attorney, witness, officer, or other person. There was no necessity, or reason, for prohibiting courts from doing acts on those days, that judges, or justices of the peace, could quietly perform, without interfering in the least, with their own right, or that of any other elector, to go to the polls and deposit his ballot. * * * I do not deny that such an act is within the letter of the statute forbidding courts from transacting any business of a civil nature on such a day; but I think it is not within the spirit or meaning of such statute, and therefore not prohibited by it.

Under the Minnesota act (*infra*), in a trial for murder, the case was given to the jury on February 22, after occupying several days. The jury returned their verdict of guilty of manslaughter the next day, and the prisoner's claim that the trial had been rendered void by the statute was denied, GILFILLAN, C. J., saying—

"In the case of a court, at least, the necessity of transacting the particular business on that day must be conclusively presumed to have been presented to and passed upon by it; and the only practicable rule is to hold its decision on that question final." *State v. Sorenson* (1884), 32. Minn. 118, 121.

Under the North Carolina Code (*infra*), a trial for murder began February 21, and was concluded the next day, when the prisoner was convicted. This was held to be no violation of the statute, MERRIMAN, J., saying—

"It (§ 3784) does not purport, in terms or effect, to prohibit persons from pursuing their usual avocations on such days, nor is there any inhibition upon public officers, not to exercise their offices respectively, nor, more particularly for the present purpose, is there any inhibition upon the courts to sit on such days, and exercise their functions and authority. There is no such statutory inhibition, nor, indeed, is there any, except such as may arise in the application of general principles of law. It has never been understood to be the law in this State, that a public holiday is *dies non juridicus*, except, perhaps, to a limited extent; it is certainly not wholly so. The courts, particularly the Superior Courts, very frequently sit on such days, and hear and try cases and dispatch the business that ordinarily comes before them, especially when there is no objection. Frequently, however, they do

not so sit, and it seems to us that ordinarily it would be better that they should not, and thus encourage the spirit and purpose of them. It may be that suitors, jurors, witnesses and others are not bound to attend court on legal holidays, but if they do, and the court proceeds with the business before it, it is not unlawful to do so, nor is it error in the court, in any particular case or matter, to so hear and dispose of it, unless it shall appear that a party thereby suffered injustice or prejudice." *State v. Moore*, Nov. 4, 1889.

The Court also thought these sentiments fortified by their decisions on the Sunday law in *State v. Howard* (1880), 82 N. C. 623; *Bland v. Whitfield* (1853), 1 Jones (N. C.) 122; *Branch v. R. R. Co.* (1877), 77 N. C. 347; *Devries v. Summit* (1882), 86 Id. 126.

The same conclusion, partially based upon *State v. Ricketts* (1876), 74 N. C. 187, but without any qualification, as holidays are not, in Alabama, accounted non-judicial days, was reached in *Pfister v. The State* (1887), 84 Ala. 432; *Belmont C. and R. R. Co. v. Smith* (1883), 74 Id. 206, 213; so, in the late case of *Robbitt v. The State* (decided June 19, 1880), where a trial for false pretense was held on Good Friday, the conviction was sustained, as there was nothing in the objection to the day upon which the trial occurred.

So, likewise, in Missouri, where the statute (*infra*), relates, by its terms, to commercial paper only, the rendering of judgment by a justice of the peace, on Thanksgiving Day, was held to be valid: *Bear v. Youngman* (1885), 19 Mo. App. 41, and in Texas, under a similar statute (*infra*), a criminal trial, held on the first day of January, was sustained, the holiday being no cause for a continuance, WINKLER, J., saying—

To the extent that holidays have been assimilated to Sunday, by statute, they must be enforced; but, we apprehend, no further. * * * * With us, the rights, duties and privileges of the citizen, as well as what duties may be performed by courts and officials, are regulated by statute law; but we nowhere find that, except as above stated, the general provisions of the statutes respecting the Sabbath, or Sunday, are to be applied to legal holidays: *Dunlap v. The State* (1880), 9 Texas App. 179, 187.

This last decision is cited with approval by WILLIE, C. J., while sustaining a civil hearing on the first day of January, because merely some things are forbidden by the statutes, on that day: *Houston, E. & W. T. Ry. Co. v. Harding* (1885), 63 Tex. 162, 164. For holidays, unlike Sundays, have only the

sanctity attached to them by statute: *ROBERTSON, A. J., Crabtree v. Whiteselle* (1885), 65 Tex. 111, 113; and the statute prescribing them is merely permissive, allowing the Courts to observe them if they see proper to do so: *Pender v. The State* (1882), 12 Texas App. 496, 506 (a murder case tried on a holiday).

Hence, the Courts may sit on the Fourth of July and enter judgment if no statute inhibits such action: *Hammer v. Sears*, S. Ct., Ga., June 1, 1888; *Russ v. Gilbert* (1882), 19 Fla. 54, 60, where *RANDALL, C. J.*, said—

It was suggested with commendable patriotic favor, that the default [for no pleading] having been entered on the "glorious fourth" of July, it was void, being *dies non*, or a national holiday. Our statute on that subject merely provides that the fourth of July shall, in regard to bills and notes, be treated as a public holiday, and presentation for acceptance or payment may be made on the preceding day. Courts and business are not inhibited on these days.

The statutory prohibition against the commencement of a suit upon a legal holiday, may be waived by pleading; such commencement is an irregularity merely.

This statement is supported by the case of *Williams v. Verne* (1887), 68 Texas 414 (also cited as *Ullman v. Verne*).

Where the action of the Court on a holiday is not void, but voidable, such action will be sustained on the ground of waiver and *laches*, where there is no immediate objection. There is now no disposition to encourage such objections, as will be seen from the following examples: an early case in Connecticut, under a peculiar statute relating to Thanksgiving day, did curtly hold the other way, the writer of the opinion denying that any act prohibited could not be sanctioned by paying a fine, and so confusing public and private relations: *Gladwin v. Lewis* (1825), 6 Conn. 49, 53. The words of the statute were—

That all persons shall abstain [upon Thanksgiving Day] from every kind of servile labour and vain recreation, works of necessity and mercy excepted.

A delay of three months in objecting that the Court had not been formally adjourned on July fourth, until the next day, is such *laches* as to constitute a waiver of any advantage which might have been taken of such an irregularity: *In re Flushing Ave.* (1886), 101 N. Y. 678.

The issuance of process has been objected to, as presupposing a fictitious session of the court, at which the writ could be avoided. The answer has been twofold: the judicial writ, awarded by the court, is a fiction, which should not be made to do such important duty at this late day; again, and better, the sessions of the courts which are forbidden must be actual sessions, with the attendance of parties, jurors and witnesses: *Glenn v. Eddy* (*supra*, p. 140).

Where no action is required on the return day, process may be made returnable to any legal holiday.

Hence, the Court of Chancery refused to quash a subpoena *ad respondendum*, returnable on the thirtieth day of May: *Kinney v. Emery* (1883), 37 N. J. Eq. 339; this upon the express ground that a legal holiday and a Sunday differed: *McEvoy v. Trustees* (1884), 38 Id. 420, 421. On Sunday no Court is open and it would be so irregular to make the subpoena returnable on such day that no attachment would be issued to enforce the appearance: *Gould v. Spencer* (1836), 5 Paige chan. (N. Y.) 541, 542.

If it be allowable to issue process, then objection has been made to its service, though without success: *Glenn v. Eddy* (*supra*, p. 140). The reasoning here applied, also embraces a refusal to extend, by implication, the prohibition upon the opening of public offices: *People, ex rel. v. Board of Supervisors* (1888), 50 Hun. (N. Y.) 105, 109, following *People v. Kearney*, (*supra*, p. 144); *Nichols v. Kelsey* (1887), 20 Abb. New Ca. (N. Y.) 14; *Fries v. Coar* (1887), 19 Id. 267; *Contra, Reynolds v. Palm* (1887), 20 Id. 11.

Indeed, process may be served, unless positively forbidden: *Meeks v. Noxon* (1855), 1 Abb. Pr. (N. Y.) 280; s. c. 11 How. Pr. (N. Y.) 189; or in violation of the object of the statute. This is especially the case in chancery proceedings, with orders, notices, and all writs not executed by arrest: Gilbert, *Forum Romanum* (Amer. ed. 1874) p. 42. Mr. Tyler doubts this, as applied to Sunday, but such was the distinct ruling of the New York Court of Chancery, in respect to the service of a subpoena and injunction on an election day: *Wheeler v. Bartlett* (1832), 1 Edw. Chan. (N. Y.) 323, the Vice-Chancellor saying—

It could offer no impediment to the privilege of going to the polls, or of voting, or returning from them.

However, even Sunday service is merely irregular, and an attachment and injunction, based upon such service were discharged only upon entering an appearance: *Mackreth v. Nicholson* (1815), 19 Vesey, Jr. 367, 368.

At law, the statutory inhibition now receives a strict construction, and the technical meaning of the word *process* is taken as a guide. This was doubted at one time, in respect to elections—

In using so comprehensive a term as *process*, it may well be supposed that the legislature wished to provide, not only against arrest, or duress, but against any molestation that might interfere with the elector, in performing the high and sacred duty which the elective franchise imposes: *CLERKE, J., Meeks v. Noxon, supra*.

Now the stricter view prevails, and what is technically a notice (in the decided case, a notice of contest of election), can be served on a legal holiday: *Whitney v. Blackburn* (1889), 17 Ore. 564.

Where service of process is forbidden and would therefore be an irregularity, the judgment rendered thereon ought not to be void, but voidable, after the analogy of the voidable action of the Court upon a legal holiday (*supra*).

A judgment by default after service of summons on a day of general election was set aside upon entering an appearance: *Pierce v. Smith* (1856), Abb. Pr. (N. Y.) 411; but such judgments are never treated with much respect.

The judgment upon such service, should be prevented by motion to set aside the service, or perhaps by plea in abatement, as suggested in *Comer v. Jackson* (1873), 50 Ala. 384; *Whitney v. Blackburn supra*.

III. MINISTERIAL ACTS.

There are two questions in relation to ministerial acts performed in a public office, on a legal holiday. The first is determined by the language of the State Statute: by this test alone, the attendance and performance of duty by a public officer is required or not. The second is open to construction: unless the statute explicitly renders void any voluntary ministerial action, the officer may, if he chooses, perform the

act with the ordinary results. The following illustrations will unfold what acts have been held to be ministerial and performable upon holidays.

The docketing of a judgment is a ministerial act, mandatory by the words of the statute and not involving any discretion; much more is this true of the docketing of a transcript of a judgment rendered in another Circuit. Such action is valid, though performed on the 25th of December: *In re Worthington* (1877), U. S. Circ. Ct. W. Dist. Wis., 7 Biss. 455.

Similarly, in Pennsylvania, where a note contained a warrant of attorney, authorizing the confession of judgment, the Court refused to strike off the judgment, regularly entered on the twenty-second of February. That the entry had been made on a legal holiday, was the sole ground for the application. The Court said—

The question now presented is a new one, and has never been passed upon by our Supreme Court, at least in any reported case. Nor, in our judgment, is it sufficiently analogous to the numerous cases which have arisen under our statute in reference to the observance of Sunday, to render the authorities on that subject pertinent and decisive. * * * We have called attention to these facts in reference to the Sabbath as a *dies non*, for the purpose of showing that what are known as "legal holidays," bear no resemblance in their character to the Christian Sunday. These are wholly creatures of the statute law, and their effect and force must depend entirely on the legislative will, as expressed by the lawmaking power. * * * Our statute creating legal holidays, might, it seems to us, be reasonably construed as having reference exclusively to commercial paper, its presentation and protest. The doctrine of the law, as expressed in the familiar maxim, "*Expressio unius, exclusio alterius*," would justify such a construction. * * * The question presented then is reduced to this: Does the term, "legal holiday," imply an absolute *dies non juridicus*? If this question be answered in the affirmative, then are the entry of judgment and the issuing of an execution, by the prothonotary, such political acts as are contrary to the statute, and therefore voidable at the suggestion of the defendant, who alleges no other equity or defence whatever. * * * We look upon that portion of the statute which simply ordains the twenty-second of February to be a legal holiday, as directory and not imperative, permissive and not obligatory, and this for the reasons: first, because the statute contains no negative words, and, secondly, because it imposes no penalty, in both of which respects it differs from the law and the adjudications in reference to the Christian Sunday. The provision in the statute, that the legal holiday shall be as Sunday, applies only to commercial paper, its maturity and protest, and not to judicial acts, or to the worldly employment in general. We are also of the opinion that the things complained of in this case, viz: the entry of the judgment and the issuing of the execution, in obedience to a præcipe, by the prothonotary, were ministerial and not judicial acts: *WOODWARD, J., Paine & Co. v. Fesco & Co.* (1886), C. P. of Luzerne County, 1 Pa. County Rep. 562.

A somewhat stricter view has, however, been taken in another Pennsylvania Court: *infra*.

A sale for taxes is a ministerial act, and, in the absence of a statutory prohibition, may be made upon Christmas, notwithstanding doubts of the wisdom and propriety of so acting upon that day: *Hadley v. Musselman* (1885), 104 Ind. 459, 462. But this view has not been followed in Pennsylvania, where a sheriff's sale, which had been held upon the twenty-second of February, was set aside, solely on that ground. The Court said—

The sale was not void on that account, and if the Court should confirm the sale, the title would not be endangered; but when a sale is made on a legal holiday, and exceptions, for that reason, are duly filed, the sale must be set aside that effect may be given to the statute. The impropriety of advertising a sheriff's sale for the Fourth of July or Christmas, is apparent. Such days are not days for judicial, or legal, business, and no one can be required to attend to such business on those days. * * * No one is bound to labor, or attend to business on these days, but any one who chooses may do so, and whatever is done, will be well done. Holidays are not necessarily, and strictly, *dies non juridici*, so that no judicial, or legal, business can be done thereon. All ministerial acts are valid. The offices may be closed, and the officers may keep holiday, but, if they choose, they may do business. Judicial business cannot, with propriety, be done on a legal holiday, yet, so far as done, will be valid. If the Twenty-second of February falls within a regular term of court, it will be *dies non juridicus*, just as restoration day, in England, is, when it falls in Easter Term. But those days ought not to be fixed for any judicial, or legal, proceedings—as, for instance, for audits or judicial sales. It will be misleading, I think, to apply the English decisions respecting *dies non juridici*. * * * No one will doubt that a legal holiday is not a day for a sheriff's sale, because execution creditors, the defendant, and the bidders must not be compelled to attend to legal business on such a day: ROWE, P. J., *Rice v. Gable* (1884), C. P. Franklin Co., 1 Pa. County Rep. 567.

The issuance of a summons by a justice of the peace, on a legal holiday, is permissible because a ministerial, and not a judicial act, the justice performing both, but in the former, he exercises no judgment: *Weil v. Geier* (1884), 61 Wis. 414; *Smith v. Ihling* (1882), 47 Mich. 614. But no trial and no judgment would be valid on a holiday: *Lampe v. Manning* (1875), 38 Id. 673; *Hemmens v. Bentley* (1875), 32 Id. 89; S. C. 14 AMER. LAW REGISTER 705. It is otherwise when the statute is so construed that it contains no prohibition upon judicial action, not conflicting with the object of the holiday: *supra*, p. 145.

IV. NOTARIAL ACTS.

In several cases, the acts of a notary in taking a deposition and an acknowledgment of a deed, have been held valid, though performed upon a legal holiday, upon the general principle that such acts were not judicial, but simply private business: *Green v. Walker* (1889), 73 Wis. 550 per COLE, C. J.; *Slater v. Schack*, S. Ct. Minn. July 17, 1889; *Rogers v. Brooks* (1875), 30 Ark. 612, 629, ENGLISH, Ch. J. saying—

We have no statute prohibiting the taking of depositions on the fourth of July, though it is not in good taste for litigants to fix upon that day for taking their depositions, unless required by some emergency.

Wilson v. Bayley (1880), 42 N. J. Law 130, is in fact opposed to the preceding cases, but the provisions of the State law, in relation to legal holidays, were followed without any discussion of the general principle. The statute (*infra*,) is peculiar in declaring that "no person shall be compelled to labor upon" a legal holiday. Upon the ground that the taking of depositions was the exerting of compulsory process by a branch of the court, this case has been approved in *Glenn v. Eddy*, S. Ct. N. J., March 11, 1889.

In *Green v. Walker* (1889), 73 Wis. 548, a deposition had been taken in Missouri, on February 22, to prove the right of property to be tried in an action of replevin in Wisconsin. The Circuit Court excluded the deposition, but the Supreme Court held this to be erroneous, COLE, C. J., saying—

"It is plain [that] our statute can have no extra-territorial effect. It could not prohibit the taking of a deposition in Michigan, or Missouri, merely by making the day, on which it was taken, a legal holiday. The legislature might, perhaps, provide that no such deposition, taken in another State, should be used as evidence in the courts of this State. * * * * We are not aware of any statute in this State which declares that a deposition, taken in another State, on a day which is made a legal holiday here, shall not be used as evidence in our courts. But the learned Circuit Court did not exclude the depositions on the ground that the taking of them was a judicial act, but thought that the policy of the law, or the purpose of it, was to exempt a citizen of the State from being called into court, for any purpose, on a legal holiday. The statute does not say that no person shall be required to attend to any business whatever on a legal holiday. If it did, it might be claimed, with much reason, that it would be a violation of the spirit of the law, to require a citizen to go to another State, to take a deposition, on such a day. There is no law which prohibits a citizen from laboring, or pursuing his worldly business, on any day of the week, except Sunday."

Taking depositions, on the fourth of July, or a general election day, is forbidden in Iowa.

V. PERFORMANCE OF CONTRACTS.

Maturing contracts, other than commercial paper, have received construction after the analogy of commercial paper, and this upon the express ground of uniformity. Such construction, however, is untenable where the statute does not expressly, or by construction, forbid the ordinary avocations of life: it has probably arisen from the confusion of thought which identifies a non-judicial day with the Sunday cessation of work.

Thus, in Wisconsin, the statute (*infra*) simply declares the days which are to be observed as holidays, and restricts the action of courts upon those days; still, a contract to deliver hogs on the first day of January, was held to have matured on the day previous, and the market price on that day, fixed the damages: *Siegbert v. Stiles* (1876), 39 Wis. 533.

The time for the further performance of contracts, (not works of necessity or charity) is expressly extended to the next secular day, in *California*, (see the statute), *Dakota*, *Idaho* and *Massachusetts*.

Speaking of the effect of the Kentucky Statute (*infra*), PRYOR, C. J., said—

"We find nothing in the Statute, prohibiting business transactions on Thanksgiving Day, or treating that day as the Christian Sabbath, except as to commercial paper, and being a mere privilege, extended to the citizen, that he may, or not, exercise, as his judgment dictates, he is required to perform his business engagements on that day, if, by the terms of his contract, such is his undertaking. The office of the insurance company was open on that day, and nothing to prevent the appellee from paying the assessments: *National Mut. Ben. Assn. v. Miller* (1887), 85 Ky. 88, 94.

VI. SCHOOL SESSIONS.

In the absence of statutory regulations, schools should be allowed the usual legal holidays and teachers suffer no deduction of salary: this upon the broad ground of conformity, as a decent usage in a civilized community: *School District v. Gage* (1878), 39 Mich. 484, 486.

There are statutory regulations in *Minnesota, Ohio, Vermont, West Virginia* and *Wisconsin*.

VII. NEGOTIABLE PAPER.

There is a want of uniformity in the day upon which commercial paper is payable, when the last day of grace happens upon a legal holiday. All the statutes fix the day, and have received literal interpretation by the Courts. There is little else to do than record the decisions as they fall into one of the classes of *payable before* or *payable after* the holiday.

Of the latter class, where the days of grace are extended to the next succeeding business day, are—

Alabama.	Louisiana,	New York, (see the statute.)
California, (see the statute.)	Missouri, (see the statute.)	North Carolina, (see the
Dakota.	Nebraska.	statute.)
Idaho.	New Mexico,	Oregon.

These States follow commercial use and allow only two days of grace, when the third would fall upon a legal holiday, by authorizing demand of payment and protest on the day next preceding the legal holiday—

Arkansas,	Kansas,	Ohio,
Colorado,	Kentucky,	Pennsylvania,
Connecticut,	Maine (see the statute),	Rhode Island,
Delaware,	Maryland (<i>infra</i>),	Tennessee,
District of Columbia,	Massachusetts,	Texas,
Florida,	Michigan (see the statute),	Vermont,
Georgia (<i>infra</i>),	Minnesota,	Virginia,
Illinois,	Mississippi,	West Virginia,
Indiana,	Montana,	Wisconsin,
Iowa,	Nevada,	Wyoming.
	New Hampshire,	

Usage at a bank, known to the parties to commercial papers, will be allowed to operate so as to make a college commencement-day (at Harvard University), such a holiday as to change the day for demanding payment; but usage cannot go further and authorize a tender, by the endorser, on the day after the commencement: *City Bank v. Cutter* (1826), 3 Pick. (Mass.) 414.

Arbor Day is not a bank holiday in six of the nine States where it is observed: See page 187, *infra*.

In unfortunate, because confusing phraseology, the statutes declare that legal holidays shall be considered as the first day of the week, commonly called Sunday, in—

Colorado,	Michigan,	Ohio,
District of Columbia,	Missouri,	Pennsylvania,
Georgia,	Nebraska,	Texas,
Illinois,	Nevada,	Vermont,
Kentucky,	New York,	Virginia,
Maryland,		Washington.

As a legal holiday may immediately precede a Sunday, provision is made for the payment which would have been due on such Sunday, to be made on the following Monday, in *Georgia, Louisiana, Maine and North Carolina*: but on the Friday preceding, in *Illinois and Missouri*.

Similarly, provision has been made, where payment would be due on a Monday, and that Monday happened to be a legal holiday, that payment may be made on the following Tuesday, in *Georgia, Maine, Nebraska, New York and North Carolina*: but on the preceding Saturday, in *Indiana, Minnesota, Missouri, Pennsylvania, Tennessee, Virginia and West Virginia*. And on the Monday itself in *Minnesota*, and at one time, in *Pennsylvania*, though this is no longer the law: *infra*.

When a legal holiday happens on a Sunday, and is transferred by law to the following Monday, such notes as fall due upon that Monday are made payable upon the preceding Saturday, in *Florida, Illinois, Maryland, North Carolina, Texas, and West Virginia*: but four days of grace are allowed, in *Maine*.

When a legal holiday happens on a Sunday, notes falling due on that Sunday are of course, payable as other notes falling due on Sunday, though there is a special statute, doubtless out of abundance of caution, in *Georgia*.

In *New Jersey*, a note falling due on the thirtieth of May, when a Sunday, can not be presented and protested for non-payment until the following Tuesday: *Hagerty v. Engle* (1881), 43 N. J. Law 299.

When the paper is not allowed days of grace, then payment is, without doubt, to be made on the next secular day *after* the holiday. This principle was settled in respect to Sunday, and has been applied to legal holidays, as the only just escape from the dilemma of payment falling due upon a day when it

could not lawfully be expected: the payment ought not to be required one day less than contracted for: and yet, the obligation to pay, being valid, must be discharged: *Commercial Bank of Kentucky v. Varnum* (1872), 49 N. Y. 269; s. c. 11 AMER. LAW REGISTER 407, citing *Avery v. Stewart* (1816), 2 Conn 69, and *Salter v. Burt* (1838), 20 Wend (N. Y.) 205 (both Sunday cases).

The difference between the time of payment of paper entitled to grace and that without grace, was explained in *Avery v. Stewart*, *supra* by SWIFT, C. J., thus—

The same custom of merchants, which has indulged three days of grace after a note is due, if that [last] day is not *Sunday*, allows but two where it is *Sunday*: and it being an indulgence, it is perfectly consistent to require payment on the second day of grace to avoid giving four days of grace; but this is a very different thing from requiring a note to be paid before it is due.

VIII. THE STATUTES.

The Code of Alabama provides—

§ 1759. Sunday, Christmas day, the first day of January, the twenty-second day of February, the twenty-sixth day of April, the Fourth day of July, the day designated by the proclamation of the Governor for public thanksgiving, Good Friday and Mardi Gras, shall each be deemed a holiday. If Christmas day, or the first day of January, or the twenty-second day of February, or the twenty-sixth day of April, or the fourth day of July falls on Sunday, the Monday following is a holiday. If any paper entitled to days of grace, by the allowance thereof, or subject to protest, becomes due on a holiday, it must be taken as due on the next succeeding business day. (Chap. 4, p. 423, ed. 1887, as amended by Act of February 26, 1889, p. 56.)

Arizona does not appear to have made any enactment on this subject; but it is to be observed that this Territory has no Sunday law.

Arkansas enacts—

SEC. 465. In all cases where bills of exchange, drafts, or promissory notes shall become due and payable on Sunday, Christmas, or on the fourth day of July, the same shall be payable on the day next preceding such Sunday, Christmas, and fourth of July, and, in case of non-payment, may be noted and protested on the next preceding day: *Provided*, that it shall not be necessary for the holder or holders of such bills of exchange, drafts, or promissory notes, to give notice of dishonor thereof until the next day after the Sunday, Christmas, or fourth of July, and every such notice, so given, shall be valid and effectual, to all intents and purposes: Digest, 1884, p. 246.

SEC. 5309. It shall be no objection to any process, writ, summons, affidavit, or order for a provisional remedy, that it was issued, made, or is dated on a holiday; nor shall it be an objection to any bond, given by or for any party to an action or taken by an officer in the course of the same, that it was made, or is dated, on such day: *Id.* p. 1018.

SEC. 5310. A summons or order for a provisional remedy, may be issued on any holiday, except Sunday, and on Sunday, where an affidavit of the plaintiff, or some other person, is made to the effect that, unless it is issued on that day, there is reasonable cause to believe that it cannot be executed: *Id.* p. 1018.

§ 5311. An order of attachment, or for the delivery of property, may be executed on any holiday except Sunday, and on Sunday when the officer having the process believes, or an affidavit of the plaintiff, or some other person is made to the effect that the affiant believes, that the property is about to be concealed or removed, or that the process cannot be executed after such holiday: *Id.* p. 1018.

SEC. 5312. A summons, subpoena, notice, order of arrest or injunction, may be issued on any holiday, except Sunday, and on Sunday, where the officer having the process, believes, or an affidavit of the plaintiff, or some other person, is made, to the effect that affiant believes, that the process cannot be executed after such holiday: *Id.* 1019.

Formerly the fourth of July was included as a kind of political Sunday: *Swinney v. Johnson* (1857) 18 Ark. 534.

California provides (Act of March 1, 1889, Laws, pp. 46, 47), by amendments to sections seven of the Civil Code and ten of the Code of Civil Procedure, that—

§ 7. Holidays, within the meaning of this Code, are: Every Sunday, the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the ninth day of September, the twenty-fifth day of December, every day on which an election is held throughout the State, and every day appointed by the President of the United States, or by the Governor of this State, for a public fast, thanksgiving, or holiday. If the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the ninth day of September, or the twenty-fifth day of December, fall upon a Sunday, the Monday following is a holiday.

The Civil Code (ed. 1885, p. 4) provides—

§ 9. All other days than those mentioned in the last two sections [*i.e.*, §§ 7 and 8, consolidated as above] are to be deemed business days for all purposes. *Id.*

§ 11. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law, or contract, to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.

The Code of Civil Procedure, as amended by Act of March 1, 1889 (Laws, p. 46), provides—

§ 134. No court shall be open, nor shall any judicial business be transacted, on

Sunday, on the first day of January, on the twenty-second day of February, on the thirtieth day of May, on the fourth day of July, on the ninth day of September, on the twenty-fifth day of December, on a day in which an election is held throughout the State, or on a day appointed by the President of the United States, or by the Governor of this State, for a public fast, thanksgiving, or holiday, except for the following purposes :

1. To give, upon their request, instructions to a jury when deliberating on their verdict.
2. To receive a verdict or discharge a jury.
3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature; *provided*, that the Supreme Court shall always be open for the transaction of business; and *provided further*, that injunctions and writs of prohibition may be issued and served on any day.

The Constitution of California (Art. VI., Sec. 5), provides that the county courts, there known as Superior Courts, and possessing, generally, original jurisdiction, "shall always be open (legal holidays and nonjudicial days excepted). * * * Injunctions and writs of prohibition may be issued and served on legal holidays and nonjudicial days." Naturally, contention was made, that all other business, on such days, was prohibited, and the statutes cited above were consequently void: but the Court construed the Constitutional prohibition to apply to terms of court, otherwise leaving the legislature to allow the transaction of business in court, such as authorized by the statutes: *People v. Soto* (1884), 65 Cal. 621.

Colorado ordains (Gen. Stat., ed. 1883)—

SECTION 1. That the following days, viz.: the first day of January, commonly called New Year's Day; the twenty-second day of February, commonly called Washington's Birthday; the thirtieth day of May, commonly called Decoration Day; the fourth day of July; the twenty-fifth day of December, commonly called Christmas Day; and any day appointed, or recommended, by the governor of this State, or the President of the United States, as a day of fasting and prayer, or thanksgiving, shall, for all purposes whatsoever, as regards the presenting for payment or acceptance, and of protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, made after this Act shall take effect, also for the holding of courts, be treated and considered as is the first day of the week, commonly called Sunday; *Provided*, that in case any of the said holidays shall fall upon a Sunday, then the Monday following shall be considered as the said holiday, and all bills, drafts, checks, or other evidence of indebtedness, falling due or maturing on either of said days, shall be deemed as due or having matured on the day previous to the first of said days; and in case the return or adjourned day in any suit, matter or hearing before any courts, shall come on any day before mentioned, such suit, matter or proceeding, commenced or adjourned as aforesaid, shall not, by reason of coming on any such day, abate, but the same shall stand

continued on [*i.e.*, to] the next succeeding day, at the same time and place, unless the next day shall be the first day of the week, when, in such case, the same shall stand continued to the day next succeeding, at the same time and place; *Provided further*, nothing in this Act shall prevent the issuing or serving of process on any of the days above mentioned. (Chap. 40, p. 538.)

SEC. 15. Bills of exchange and promissory notes, maturing on Sunday, the fourth day of July, Christmas, or any day set apart by the President of the United States, or the governor, as a day of public fasting or thanksgiving, shall be deemed to fall due the previous day, and may be presented and protested accordingly. (Chap. 9, p. 146.)

AN ACT to establish Arbor Day (Approved, March 21, 1889).

SECTION 1. The third Friday of each year shall be set apart and known as "Arbor Day," to be observed by the people of this State in the planting of forest trees, for the benefit and adornment of public and private grounds, places and ways, and in such other efforts and undertakings as shall be in harmony with the general character of the day so established; *Provided*, That the actual planting of trees, may be done on the day designated, or at such other most convenient time as may best conform to local climatic conditions, such other time to be designated, and due notice thereof given by the several County Superintendents of Schools for their respective counties.

SECTION 2. The day, as above designated, shall be a holiday in all public schools of the State, and school officers and teachers are required to have the schools under their respective charge observe the day by planting of trees, or other appropriate exercises.

SECTION 3. Annually, at the proper season, the Governor shall issue a proclamation, calling the attention of the people to the provisions of this Act, and recommending and enjoining its due observance. The Superintendent of Public Instruction, and the respective County Superintendents of schools shall also promote, by all proper means, the observance of the day; and the said County Superintendents of schools shall make annual reports to the State Forest Commissioner of the action taken in this behalf in their respective counties. (Session Laws of 1889, p. 21.)

The Statute of Colorado, closing public offices, has already been printed, *ante*, p. 67.

Connecticut General Statutes (Revision of 1887) provide—

SEC. 1862. The first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, and the twenty-fifth day of December, or whenever any of said days shall fall upon Sunday, the Monday next following such day, and any day appointed, or recommended, by the Governor of this State, or the President of the United States, as a day of thanksgiving, fasting, or any religious observance, shall, for all purposes regarding the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes, be treated as public holidays, and all such checks, bills, and notes, otherwise presentable for acceptance, or payment, on any of the said days, shall be deemed to be presentable therefor on the secular or business day next preceding such holiday, and in case, by reason of a publi-

holiday falling upon Sunday, the following Monday is deemed such holiday, as hereinbefore provided, the same shall be presentable on the Saturday preceding.

SEC. 1511. Every person who shall use fire-crackers, except on the fourth day of July, or other public holiday, under such regulations as the authorities of the town, city, or borough in which they are used, shall prescribe, shall be fined five dollars. (p. 341.)

SEC. 1512. Every person who shall discharge any cannon, pistol, gun, fire-crackers, torpedo, or any explosive, causing a loud report, or who shall, by ringing a bell, blowing a horn, beating a drum, or in any manner making any disturbing noise, or make a bonfire, between sunset on the third day of July, and four o'clock in the afternoon on the following day, or between eleven o'clock in the evening of July fourth and sunrise of the following day, shall be fined not more than five dollars. (*Id.*)

SEC. 1513. Every person who shall discharge any cannon, or other fire-arm, loaded with ball, bullet, shot, or other hard substance, on any fourth day of July, within the corporate limits of any city or borough, shall be fined not more than seven dollars. (*Id.*)

SEC. 1514. If any person shall be sick, or in such condition as likely to be injured in health, by noise or disturbance, a notice to that effect, signed by a practicing physician, may, during the third and fourth days of July, be conspicuously placed on the front of the house where such person is staying, and every person having knowledge of said notice, who shall, during the time such notice is displayed, make any disturbing noise, as defined in Section 1512, within four hundred feet of said house, shall be fined not more than five dollars. (*Id.*)

SEC. 1515. Whenever the fourth day of July shall occur on Sunday, and the celebration of American Independence shall be held on any other day, the provisions of the three preceding sections shall extend to, and in all respects have full force and effect on the day of such celebration, and to the same extent, meaning, and intention, as though such celebration had occurred on the fourth day of July. (*Id.*)

SEC. 1516. Nothing in the four preceding sections contained, shall apply to, or affect, any person engaged in blasting, nor to the ringing of any bell, for fire, factory, church, or funeral services, or purposes, nor to any military, sheriff, or police duty. (*Id.*)

Dakota Compiled Laws of 1887, provide—

§ 4749. Holidays are, every Sunday, the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, the thirtieth day of May, every day on which an election is held throughout the Territory, and every day appointed by the President of the United States, or by the Governor of this Territory, for a public fast, thanksgiving, or holiday. (p. 813.)

§ 4750. If the first day of January, the twenty-second day of February, the fourth day of July, or the twenty-fifth day of December, falls upon a Sunday, the Monday following is a holiday. (*Id.*)

§ 4751. All other days than those mentioned in the last two sections, are to be deemed business days, for all purposes. (*Id.*)

§ 4752. Whenever any act of a similar nature, other than a work of necessity, or mercy, is appointed by law or contract to be performed upon a particular day,

which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed. (*Id.*)

§ 4524. Days of grace are allowed, unless there be an express stipulation to the contrary, as follows: 1. On all bills of exchange, or drafts, payable at sight, whether foreign or inland, the party or parties upon whom the same are drawn, shall have three days of grace after presentation for payment of the same; but Sundays and holidays are excluded from the computation of the aforesaid days of grace.

Delaware enacts—

SECTION 1. From and after the passage of this Act, payment of all notes, checks, or other instruments negotiable by the laws of this State, and becoming payable on Christmas day, or the fourth of July [or the day recommended by the Governor of this State as a day of thanksgiving, commonly called Thanksgiving Day, whenever the same shall be so recommended], shall be deemed to become due on the secular day next preceding the afore mentioned days respectively; on which said secular days, demand of payment may be made, and in case of non-payment, or dishonor of the same, protest may be made and notice given in the same manner as if such note, check, bill of exchange, or other instrument, fell due on the day of such demand, and the rights and liabilities of all parties concerned therein, shall be the same as in other cases of like instruments legally proceeded with; Provided, that nothing herein contained, shall be so construed as to render void any demand, notice, or protest made or given, as heretofore, at the option of the holder, nor shall the same be so construed as to vary the rights or liabilities of the parties to any such instruments heretofore executed. (Revd. Laws, p. 357, ed. 1874; Laws of 1855, vol. 11., chap. 195, as amended by Laws of 1861, vol. 1, chap. 14.)

SECTION 1. That whenever any legal holiday, other than Sunday, shall fall upon a Sunday, the next day shall be observed as such legal holiday; *provided*, that this Act shall not be construed to alter or change any law or custom concerning the payment of promissory notes, checks or bills of exchange. (L. of 1885, ch. 551, p. 793.)

The District of Columbia is provided with legal holidays, according to the Revised Statutes of the United States relating to the District, as follows :

SEC. 993. The following days, namely: The first day of January, commonly called New Year's day; the fourth day of July; the twenty-fifth day of December, commonly called Christmas day; and any day appointed or recommended by the President of the United States as a day of public fast or thanksgiving, shall be holidays within the District, and shall, for all purposes of presenting for payment or acceptance, for the maturity and protest, and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes, or other negotiable or commercial paper, be treated and considered as is the first day of the week commonly called Sunday. And all notes, drafts, checks, or other commercial or negotiable paper, falling due or maturing on either of said holidays shall be deemed as having matured on the day previous. (p. 116).

Act of January 31, 1879 (20 Stat. L. 277), provides: That section nine hundred and ninety-three of the Revised Statutes of the United States, relating to the

District of Columbia, be, and the same is amended by adding to the days therein declared to be holidays within the District, the twenty-second day of February; and such day shall be a holiday for all the purposes mentioned in said section: *Provided*, That this act shall not apply to the twenty-second day of February, eighteen hundred and seventy nine.

By Joint Resolution, approved April 16, 1880, (21 Stat. L. 304) it was provided: That the employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and such day as may be designated by the President of the United States as a day of public fast or thanksgiving: *Provided*, That the said employees shall be paid for these days only when the employees at the other government departments shall be so paid: *And provided further*, That nothing herein contained shall authorize any additional payment to such employees as receive annual salaries.

The Act of June 18, 1888 (25 Stat. at Large, p. 185), provides: That section nine hundred and ninety-three of the Revised Statutes of the United States relating to the District of Columbia, be and the same hereby is amended by adding to the days therein declared to be holidays within the said District, that day upon which the President of the United States is inaugurated, otherwise called inauguration day, and that such day shall be a holiday for all purposes mentioned in said section.

The Act of August 1, 1888 (25 Stat. at Large 353), provides: That the thirtieth day of May in each year, usually called "Decoration Day," shall be and hereby is made a holiday within the District of Columbia as fully in all respects as are the days mentioned in section nine hundred and ninety-three of the Revised Statutes of the District of Columbia.

Florida enacts (McClellan's Dig., ed. 1881)—

SEC. 4. The following days, namely: The first day of the week, commonly called Sunday; the first day of January, commonly called New Year's day; the twenty-second day of February, known as Washington's birthday; the fourth day of July, called Independence day; the twenty-fifth day of December, known as Christmas day; any general election day, and any day appointed or recommended by the Governor of this State or the President of the United States as a day of thanksgiving or fasting and prayer, or other religious observance—shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, made after the passage of this law, be treated and considered as public holidays, and all such bills, checks and notes otherwise presentable for acceptance or payment on the said days, shall be deemed to be presentable for acceptance or payment on the secular or business day next preceding such holiday. (p. 457.)

SEC. 5. Whenever the first day of January, the twenty-second day of February, the fourth day of July, or the twenty-fifth day of December, shall fall on a Sunday, the Monday following shall be deemed a public holiday for all or any of the purposes aforesaid: *Provided, however*, that in such cases all bills of exchange, checks and promissory notes, made after passage of this law, which would otherwise be presentable for acceptance or payment on said Monday, shall be deemed to be presentable for acceptance or payment on the Saturday preceding. (p. 458.)

The Code of Georgia (ed. 1882) provides—

§ 2783. The following days, viz: the first of January, commonly called New-year's day; the twenty-second of February, known as Washington's birth-day; the twenty-sixth day of April, known as Decoration day; the fourth day of July, called Independence day; the twenty-fifth day of December, known as Christmas day; and any day appointed or recommended by the Governor of the State, or the President of the United States, or any municipal authority, as a day of thanksgiving or fasting, and prayer, or other religious observances, shall for all purposes whatsoever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, made after February twenty-third, 1875, be treated and considered as the first day of the week, commonly called Sunday, and as public holidays; and all such bills, checks, and notes, otherwise presentable for acceptance or payment on said days shall be deemed to be presentable for acceptance or payment on the secular day next preceding such holidays. (p. 697.)

§ 2783 (a). Whenever the first day of January, twenty-second day of February, the twenty-sixth day of April, the fourth day of July, or the twenty-fifth day of December shall fall upon Sunday, the Monday next following shall be deemed a public holiday, and papers due on such Sunday, shall be payable on the Saturday next preceding, and papers which would otherwise be payable on said Monday, shall be payable on the Tuesday next thereafter. Whenever either of the days shall fall on Saturday, the papers due on the Sunday following shall be payable on the above named Monday next succeeding. Whenever either of the said days shall fall on Monday the papers which would otherwise be payable on that day shall be payable on the Tuesday next succeeding. (*Id.*)

§ 3614. Sundays and holidays shall in no case be included in the computation of the time within which an appeal shall be entered [except that holidays are included in the computation in cases of appeal from Justices' Courts]. (p. 923.)

Idaho enacts (Revised Stat. in force June 1, 1887)—

SEC. 10. Holidays within the meaning of these Revised Statutes, are: Every Sunday, the first day of January, the twenty-second day of February, the fourth of July, the twenty-fifth day of December, every day on which an election is held throughout the Territory, and every day appointed by the President of the United States, or the Governor of this Territory, for a public fast, thanksgiving, or holiday. (p. 62.)

SEC. 11. The time within which any Act provided by law is to be done, computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded. (*Id.*)

SEC. 12. Whenever any Act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such Act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed. (*Id.*)

SEC. 1299. The last Monday in April in each year, is set apart for and hereby declared to be a legal holiday in Idaho Territory, to be known as "Arbor Day," and is so declared for the purpose of encouraging the planting and setting out of trees in said Territory. (p. 194.)

payment, or acceptance, and of protesting for, and giving notice of dishonor of bills of exchange, bank checks, and promissory notes, placed by law on the footing of bills of exchange.

§ 2. If any of these days, named as holidays, shall occur on Sunday, the next day thereafter shall be observed as [a] holiday; but bills of exchange, or other paper, may be presented for payment or acceptance, on the Saturday preceding such holiday, and proceeded on accordingly.

Louisiana establishes legal holidays by the following laws—

ART. 207. No citation can issue, no demand can be made, no proceeding had, nor suits instituted on Sundays, on the Fourth of July, on the first or eighth of January, on the twenty-fifth of December, twenty-second of February, or on Good Friday; nor shall any arrest be made after sunset, on any individual, in his domicile. (Code of Practice, ed. 1875, p. 77.)

AN ACT making Shrove Tuesday, or Mardi Gras, a legal holiday.

SECTION 1. *Be it enacted, etc.*, That the day known as Shrove Tuesday, or Mardi Gras, be and is hereby declared a legal holiday throughout the State of Louisiana. (Approved, Apl. 23, 1872, Laws, p. 95.)

AN ACT to amend, etc.

SECTION 1. *Be it enacted, etc.*, That Section six of an Act entitled "An Act relative to bills of exchange and promissory notes," approved March ninth, 1855, be amended and re-enacted so as to read as follows:—

That the following shall be considered as days of public rest in the State, namely: The first day of January, the eighth of January, the twenty-second of February, Fourth of July, twenty-fifth of December, twelfth of February, Sundays and Good Fridays, and all promissory notes and bills of exchange shall be due and payable the day following the third, or last day of grace, if the third, or last day of grace be a Sunday or legal holiday, as herein provided; and should the day succeeding the last, or third day of grace also be a Sunday or legal holiday, then promissory notes and bills of exchange shall be payable on the following day, not a Sunday or legal holiday; and in computing the delay allowed for giving notice of non-acceptance or non-payment of a bill of exchange or promissory note, the days of public rest shall not be counted, and if the day or two days next succeeding the protest for non-acceptance or non-payment shall be days of public rest, then the day following shall be computed as the first day after the protest. (Approved March 16, 1870, Laws, p. 98.)

Maine provides (Rev. Stat., ed. 1884)—

SEC. 9. On any promissory note, inland bill of exchange, draft, or order, for the payment of money, payable in this State at a future day, or at sight, and not on demand, a grace of three days is allowed. If the third day is Sunday, a day of public fast or thanksgiving, appointed by the Governor and Council, the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, or Christmas day, two days are allowed. If the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of

July, or Christmas, is Monday, and it is the third day of grace, or is Saturday, and the following Sunday is the third day of grace, or is Sunday and it is the second day of grace, four days are allowed. (Chap. 32, p. 334.)

SEC. 48. No court shall be held on Sunday, on any day designated for the annual fast or thanksgiving, or for the choice of Presidential electors, the thirtieth of May, fourth of July, the day of the State election, or on Christmas day; and when the time fixed for a term of said court falls on either of said days, it shall stand adjourned until the next day, which shall be deemed the first day of the term for all purposes. (Chap. 77, p. 637.)

SEC. 79. No person shall be arrested, in a civil action, on mesne process, or execution, or on a warrant for taxes, on the day of annual fast, or thanksgiving, the thirtieth of May, the fourth of July, or Christmas; and, on the day of any military training, inspection, review, or election, no officer or soldier, required by law to attend the same, shall be arrested on any such process. (Chap. 81, p. 687.)

SEC. 80. No elector shall be arrested, except for treason, felony, or breach of the peace, on the days of election of the United States, State, or town officers. (id.)

Maryland ordains (Act of February 17, 1882, Laws, pp. 59-60), by—

An Act to designate the holidays to be observed in the acceptance and payment of bills of exchange, bank checks, drafts and promissory notes.

SECTION 1. *Be it enacted*, etc., That the following days in each and every year, viz.: The first day of January, commonly called New Year's day; the twenty-second day of February, known as Washington's birthday; the fourth day of July, called Independence Day; the twenty-fifth day of December, known as Christmas Day; Good Friday; and all days of general and Congressional elections throughout the State; and all special days that may be appointed or recommended by the Governor of this State, or by the President of the United States, as days of thanksgiving or fasting and prayer, or other religious observance, or for the general cessation of business, shall be regarded as legal holidays, and shall be duly observed as such, and shall for all purposes whatsoever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks, drafts and promissory notes, be treated and considered as the first day of the week, commonly called Sunday; and all such bills, checks, drafts and notes presentable for acceptance or payment on these said days shall be deemed to be presentable for acceptance or payment on the secular or business day next preceding such holiday.

SEC. 2. *Be it enacted*, That whenever the first day of January, the twenty-second day of February, the fourth day of July, or the twenty-fifth day of December shall, either of them, occur on Sunday, the Monday next following shall be deemed and shall be treated as a public holiday for all or any of the purposes aforesaid; provided, however, that in such case all bills of exchange, bank checks, drafts and promissory notes, which would otherwise be presentable for acceptance or for payment on either of the Mondays so observed as a holiday, shall be deemed to be presentable for acceptance or for payment on the Saturday next preceding such holiday, and such Mondays so observed shall for all purposes whatever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks, drafts and promissory

notes, be also treated and considered as the first day of the week, commonly called Sunday.

Massachusetts (Public Stat., ed. 1882) enacts—

SEC. 34. The general court [*i. e.* the Legislative body,] shall hold no session for the transaction of ordinary business on Thanksgiving, Fast or Christmas day, the twenty-second day of February, the thirtieth day of May, the fourth day of July, nor on the following day when either of the three days last mentioned occurs on Sunday, and the public offices shall be closed on said days. (Chap. 2, p. 57.)

SEC. 8. Bills of exchange, drafts, promissory notes, and contracts, due and payable or to be performed on a Sunday, on a Fast or Thanksgiving day appointed or recommended by the Governor of the Commonwealth, or by the President of the United States, on Christmas day, on the twenty-second day of February, on the thirtieth day of May, on the fourth day of July, or on the following day when either of the three days last mentioned occurs on a Sunday, shall be payable or performable upon the business day preceding said days; and, in case of non-payment or non-fulfilment, may be noted or protested upon such preceding day; but the holder or holders of such obligations need not give notice of the dishonor, non-payment, or non-fulfilment thereof until the business day next following the days above specified. (Chap. 77, p. 427.)

SEC. 4. Courts shall not be opened on Sunday, Thanksgiving, Fast or Christmas day, the twenty-second day of February, the thirtieth day of May, the fourth day of July, or the following day when either of the three days just mentioned occurs on Sunday, unless for the purpose of entering or continuing cases, instructing or discharging a jury, receiving a verdict or adjourning; but this section shall not prevent the exercise of the jurisdiction of any magistrate in criminal cases to preserve the peace or arrest offenders. (Chap. 160, p. 918.)

AN ACT relating to sessions of Probate Courts, which occur on legal holidays or on the day of the National or State election.

SECTION 1. Whenever a regular term of any Probate Court shall occur on a legal holiday or on the day of any National or State election, said probate court shall be held on the next secular day thereafter; and all notices, citations, orders, and other papers which are made returnable to said regular term shall be held and deemed returnable to said next secular day, and the proceedings thereon shall be held and deemed to be of the same force and validity as if said notices, citations, orders, and other papers had been made returnable to said next secular day. (Acts of 1884. Chap. 141, p. 121.)

AN ACT to make the first Monday of September known as Labor's Day a legal holiday.

SECTION 1. The first Monday of September in each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Thanksgiving, Fast and Christmas days, the twenty-second of February, the thirtieth day of May and the fourth day of July, are now by law made public holidays. (Act of 1887. Chap. 263, p. 893.)

AN ACT to prohibit the sale of intoxicating liquor, on Fast Day, Memorial Day, Thanksgiving Day and Christmas Day.

SECTION 1. Any common victualler, having a license to sell intoxicating liquors under either of the first three classes of section ten of chapter one hundred of the Public Statutes, who shall sell, give away or deliver, on the licensed premises, any of such liquors on Fast day, or on the thirtieth day of May, commonly called Memorial day, or Thanksgiving day, or on the twenty-fifth day of December, commonly called Christmas day, or on the twenty-sixth day of December when the said Christmas day falls upon Sunday, shall be liable to the penalty prescribed in section eighteen of chapter one hundred of the Public Statutes or in acts in amendment thereof. (Acts of 1888, ch. 254, p. 206.)

SECTION 2. Any innkeeper having a license to sell intoxicating liquors, who shall, on either of the days named in the first section of this Act, sell, give away or deliver, in his inn, any intoxicating liquors, except to bona fide guests or travellers sojourning at his inn, shall be liable to the penalty above prescribed. (id.)

Michigan (Howell's Compiled Stat., ed. 1882) enacts—

§ 1591. That the following days, viz.: The first day of January, commonly called New Year's day; the twenty-second day of February, commonly called Washington's birthday; the fourth of July; the twenty-fifth day of December, commonly called Christmas day; the thirtieth day of May, commonly called decoration day, and any day appointed or recommended by the Governor of this State, or the President of the United States, as a day of fasting and prayer or thanksgiving, shall, for the purposes of presenting for payment or acceptance, and of protesting notice of the dishonor of bills of exchange, bank checks, and promissory notes, made after this Act shall take effect, also for the holding of courts, be treated and considered as the first day of the week, commonly called Sunday. *Provided*, that in case any of the holidays shall fall upon a Sunday, then the Monday following shall be considered as the said holiday. *Provided also*, that in case the return or adjourn day in any suit, matter, or hearing before any court officer, referee or arbitrators shall come on any of the days first above named except Sunday, such suit, matter or proceeding, commenced or adjourned as aforesaid, shall not, by reason of coming on any of such days except Sunday, abate, but the same shall stand continued on the next succeeding day, at the same time and place, unless the next day shall be the first day of the week, or a holiday, in which case the same shall stand continued to the day next succeeding said first day of the week or holiday, at the same time and place: *Provided further*, that whenever the first day of the general term of any circuit court, as fixed by the order of a circuit judge, shall fall upon either of the days first above named, or whenever any circuit court shall be adjourned to any of the days first above named, such court may be adjourned to the next succeeding secular day. *Provided further*, that nothing in this section shall make invalid a presentation, demand, or notice of dishonor of commercial paper on any such holiday, other than Sunday, in cases where the same shall not have been presented on the secular day next preceding such holiday. (p. 455.)

§ 2274. All saloons, restaurants, bars, in taverns or elsewhere, and all other places where any of the liquors mentioned in sections one and two of this Act [*i.e.* spirituous, malt, brewed, fermented, or vinous liquors, or any beverage containing the same] are or may be sold, or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called Sunday, on all election

days, on all legal holidays, and until seven o'clock of the following morning, and on each week-day night from and after the hour of nine o'clock, until seven o'clock of the morning of the succeeding day. The word "closed" in this section shall be construed to apply to the back door as well as to the front door. And in prosecutions under this section, it shall not be necessary to prove that any liquor was sold: *Provided* that in all cities and incorporated villages, the common council may, by ordinance, allow the saloons and other places where said liquor shall be sold, to remain open not later than ten o'clock on any such week-day night. (p. 598.)

CONCURRENT RESOLUTION. *Resolved* (the House concurring), That the Governor is hereby requested to call the attention of the people of this State to the importance of planting trees for ornament and shade, by naming a day upon which this work shall be given special attention, to be known as "Arbor Day." (Approved March 26, 1885, Laws, p. 378.)

The General Statutes of Minnesota provide—

"§ 1. That the twenty-second day of February, the anniversary of the birthday of Washington, and the thirtieth day of May, known as "Memorial Day," shall be observed in this State as a national holiday each and every year hereafter; that no public business, except in case of necessity, shall be transacted on that day; and that no civil process shall be served on that day." (Chap. 124, vol. 1, ed. 1878, p. 1009, as amended by Act of April 24, 1889, Laws, p. 203.)

"§ 2. He [the Governor] shall, by proclamation, set apart one day in each year as a day of solemn and public thanksgiving to Almighty God for his blessings to us as a State and nation; and no business shall be transacted on that day at any of the departments of State." (Chap. 6, vol. 1, ed. 1878, p. 85.)

"§ 10. Bills of exchange, drafts, promissory notes and contracts, due or payable, or to be executed on Sunday, Thanksgiving day, Good Friday, Christmas day, New Year's day, the twenty-second day of February, the Fourth of July, or on the following day, when either of the four days last mentioned occurs on Sunday, shall be payable or performable upon the business day next preceding said days; and in case of non-payment or non-fulfilment, shall be noted and protested upon such preceding day; but notice of the dishonor, non-payment or non-fulfilment need not be given until the business day next following the days above specified." (Chap. 23, vol. 1, ed. 1878, p. 316.)

"§ 31 a. In any contract between any teacher and board of trustees, or board of education, a school month shall be construed and taken to be twenty days, or four weeks of five school days each; and no teacher shall be required to teach school on Christmas day, the first day of January, the Fourth of July, Memorial day, or the day appointed by the President of the United States or the Governor of the State, as a day of thanksgiving; and no deduction from the teacher's time or wages shall be made by reason of the fact that a school day happens to be one of the days referred to in this section; and any contract made in violation of this section shall have no force or effect as against the teacher." (Act March 5, 1887, c. 122, § 1: 2 Gen. Stat., ed. 1888, p. 439.)

"§ 31 b. In reckoning attendance, the standing of no scholar shall be affected by reason of non-attendance upon any of the days named in section one of this act whenever they occur within the school term, the same as if the school had been held and all had been present." (Id. § 2.)

The Revised Code of Mississippi (ed. 1880), provides—

§1132. When the day on which any bill of exchange or promissory note should be presented for acceptance or payment according to its terms, shall be a Sunday, New Year's day, Fourth of July, or Christmas day, it shall be presentable on such day next before the day on which by its terms it is presentable, as shall not be one of the days herein specified. (p. 332.)

The Revised Statutes of Missouri (ed. 1889), provide—

SEC. 737. The following days, namely: The first day of January, the twenty-second day of February, the fourth day of July, any general State election day, any thanksgiving day appointed by the Governor of this State, or by the President of the United States, and the twenty-fifth day of December, are hereby declared and established public holidays, and when any such holiday falls upon Sunday, the Monday next following shall be considered such holiday. For all purposes whatsoever, as regards the presenting for payment or acceptance, and of presenting and giving notice of the dishonor of bills of exchange, bonds, promissory notes or other mercantile paper, such holidays shall be treated and considered the same as the first day of the week, commonly called Sunday, and all bills of exchange, bonds, promissory notes, or other mercantile paper falling due on such holiday or Sunday, shall be considered as falling due on the next succeeding day, unless such succeeding day be a holiday, or Sunday, in such case it shall be considered as falling due the day previous. (Vol. 1, ch. 18, p. 257.)

SEC. 8952. No person, on Sunday, on the fourth day of July, on the first day of January, or any general State election day, on any thanksgiving day appointed by the Governor of this State or the President of the United States, or on the twenty-fifth day of December, and the twenty-second day of February, shall serve or execute any writ, process, warrant, order or judgment, except in criminal cases, or for a breach of the peace, or when the defendant is about leaving the county, or in any case of attachment when the debtor is about fraudulently to secrete or remove his effects; and the service of every such writ, process, warrant, order or judgment, shall be void, and the person serving, or executing the same shall be as liable to the suit of the party aggrieved as if he had done the same without any writ, process, warrant, order or judgment. (Vol. 2, ch. 175, p. 2065.)

SEC. 525. * * * Where the affidavit for an attachment states that the plaintiff will lose his claim unless the writ of attachment issues, and be served, on Sunday, or on any legal holiday, the writ may be issued and served on that day. (p. 220.)

The Code of Civil Procedure of Montana provides (Comp. Stat., ed. 1888)—

SEC. 531. No court shall be opened, nor shall any judicial business be transacted on Sunday, New Year's day, Fourth of July, Christmas day, Washington's birthday, Thanksgiving day, or on a general election, except for the following purposes: *First.* To give, upon their request, instructions to a jury then deliberating on their verdict. *Second.* To receive a verdict or discharge a jury. *Third.* For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature. *Fourth.* When it shall appear by the affidavit of the plaintiff, or some one in his behalf, in cases for the recovery of specific personal

property, that the defendant is about to conceal, dispose of, or remove such property out of the jurisdiction of the court, an order for taking possession of the same may be issued on any day. *Fifth.* When an application for a writ of attachment is made, and it shall appear by the affidavit of the plaintiff, or some one in his behalf, that the defendant is about to dispose of, conceal, or move property subject to execution or attachment, out of the jurisdiction of the court, a writ of attachment may be issued on any day. (p. 199.)

When the day fixed for the opening of a court shall fall on any of the days mentioned in this section, the court shall stand adjourned until the next succeeding day. (p. 200.)

The General Laws of Montana provide (Comp. Stat., ed. 1888)—

SEC. 158. Bills of exchange and promissory notes falling due on Sunday, the fourth day of July, Christmas, or any day set apart by the President of the United States, or the Governor of this Territory, as a day of public fasting or thanksgiving, shall be deemed to fall due on the previous day; and may be prosecuted and protested accordingly. (p. 636.)

Nebraska compiled Statutes (ed. 1889) provide—

SEC. 38. No court can be opened, nor can any judicial business be transacted on Sunday, or on any legal holiday, except: First—To give instructions to a jury then deliberating on their verdict. Second—To receive a verdict, or discharge a jury. Third—To exercise the powers of a single magistrate in a criminal proceeding. Fourth—To grant or refuse a temporary injunction or restraining order. (Act of March 21, 1889, Laws p. 379-380.)

SEC. 8. That the following days, to wit: the first day of January, February twenty-second, and the twenty-second of April, which shall be known as "Arbor Day," the twenty-fifth day of December, the thirtieth day of May and July fourth, and any day appointed, or recommended by the Governor of this State, or the President of the United States, as a day of fast, or thanksgiving, and when any one of these days shall occur on Sunday, then the Monday following, shall, for all purposes whatsoever, as regards the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks, or promissory notes, made after the passage of this Act, be deemed public holidays, and be treated and considered as is the first day of the week, commonly called Sunday. *Provided,* That when any one of these days shall occur on Monday, any bill of exchange, bank check, or promissory note, made after the passage of this Act, which but for this Act would fall due and be payable on such Monday, shall become due and payable on the day thereafter. (Ch. 41, p. 523.)

SEC. 9. The first Monday in the month of September in each year, shall hereafter be known as "Labor Day," and shall be deemed a public holiday, in like manner and to the same extent as the holidays provided for in Section 8 of Chapter 41 of the Compiled Statutes of 1887. (Id. Act of March 29, 1889, Laws p. 579.)

Nevada (Gen. Stat., ed. 1885) enacts—

2469. SEC. 50. No court shall be open, nor shall any judicial business be transacted on Sunday, on New Year's day, on Washington's Birthday, on the thirtieth of May, commonly known as Memorial day, on the Fourth of July, on Thanks-

giving Day, on Christmas Day, or any day on which the general election is held, except for the following purposes: First—To give upon their request, instructions to a jury then deliberating on their verdict. Second—To receive a verdict or discharge a jury. Third—For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature. Fourth—For the issue of a writ of attachment, which writ may be issued on each and all of the days above enumerated, upon the plaintiff, or some person in his behalf, setting forth in the affidavit required by law for obtaining said writ, the additional averment, as follows: That the affiant has good reason to believe, and does believe, that it will be too late for the purpose of acquiring a lien by said writ, to wait till a subsequent day for the issuance of the same. And all proceedings instituted and writs issued and official acts done on any of the days above specified, under and by virtue of this section, shall have all the validity, force and effect of proceedings commenced on other days, whether a lien be obtained or a levy made under and by virtue of said writ. (p. 655.)

4879. SECTION 1. The following days, namely: The first day of January, Washington's birthday, or the twenty-second day of February, the fourth day of July, thanksgiving day on the proclamation of the Governor, the twenty-fifth day of December, commonly called Christmas day, shall for all purposes whatsoever as regards the presenting for payment, or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, checks and promissory notes, made after the passage of this Act, be treated and considered as is the first day of the week, usually called Sunday. Three days, commonly called days of grace, shall be allowed, except on sight bills or drafts; and any one of the holidays specified in this act coming within the three days of grace shall be counted as one of such days. (p. 1085.)

4880. SECTION 1. All bills of exchange, checks, promissory notes, or other negotiable instruments, which, by the terms thereof, are payable with or without grace, if the day for the payment thereof shall fall on any Sunday, or on any of the holidays designated in that certain Act, entitled, "An Act to designate the holidays to be observed in the acceptance and payment of bills of exchange and promissory notes," approved October thirtieth, eighteen hundred and sixty-one [*Supra*, 4879,] the same shall become due and payable on the day previous to any of the days aforesaid. (p. 1085.)

CHAP. XLIV. AN ACT establishing Arbor Day (approved February 10, 1887).

SECTION 1. Arbor Day is hereby established in the State of Nevada, and shall be fixed, each year, by proclamation of the Governor, at least one month before the fixing of such date, and it shall be observed as a holiday by the public schools of the State; *provided*, that nothing in this Act shall be so construed as making this a legal holiday, so far as the courts and civil contracts are concerned.

SEC. 2. His Excellency the Governor, is requested to make proclamation, setting forth the provisions of the first section of this Statute, and recommending that Arbor Day, so established, be observed by the people of the State, in the planting of trees, shrubs, and vines, in the promotion of forest growth and culture, in the adornment of public and private grounds, places and ways, and in such other efforts and undertakings as shall be in harmony with the character of the day so established. (Laws, p. 51.)

New Hampshire enacts—

SEC. 9. Bills of exchange, drafts, promissory notes, and contracts, maturing or to be executed on Sunday, Thanksgiving, Fast or Christmas days, or on the fourth day of July, on the twenty-second day of February, or on the thirtieth day of May, or on any day on which a general election is held for members of the legislature, or on the following day, when either of the two days last mentioned occurs on Sunday, are payable and to be executed on the day next preceding, not being one of said days, and may be noted and protested for nonpayment or nonfulfillment, on such next preceding day. (Laws of 1878, p. 509, ch. 220, as amended by Act of 1887, ch. 20, s. 1, p. 419.)

New Jersey provides (Act of June 1, 1886, P. L. 386, Supp. to Revision, p. 361)—

1. That the first day of January, the twenty-second day of February, thirtieth day of May, fourth day of July, Thanksgiving day, twenty-fifth day of December, and any day upon which a general election shall be held for members of Assembly, in each year, and also any day set apart by proclamation of the Governor of this State, or by the President of the United States, for the purpose of public observance, shall be a legal holiday, and no court shall be held upon said days, except in the cases where said court would now sit upon a Sunday, and no person shall be compelled to labor upon any of said days, by any person or corporation. [Identical with Act of April 4, 1876, P. L. 73; Revision, p. 841.]

New Mexico enacts (Comp. Laws, ed. 1885)—

SEC. 1730. Any promissory note or order for the payment of money at some future time which by its terms becomes due and payable on Sunday or on any legal holiday, shall be construed to fall due and become payable on the next business day thereafter; and for the purposes of this Act the fourth day of July, the twenty-fifth day of December (Christmas), the first day of January (New Year's day), and all days designated by public proclamation of the Governor as fast days or thanksgiving days, shall be deemed legal holidays. (p. 858.)

The Laws of New York provide—

§ 1. The following days and half days, namely: The first day of January, commonly called New Year's day; the twenty-second day of February, known as Washington's Birthday; the thirtieth day of May, known as Decoration Day; the fourth day of July, called Independence Day; the first Monday in September, to be known hereafter as Labor Day; the twenty-fifth day of December known as Christmas Day; any general election day in this State; every Saturday from twelve o'clock at noon, until twelve o'clock at midnight, which is hereby designated a half holiday; and any day appointed or recommended by the Governor of this State, or the President of the United States, as a day of Thanksgiving, or fasting and prayer, or other religious observance, shall, for all purposes whatever as regards the presenting for payment or acceptance, and of the protesting and giving notice of dishonor of bills of exchange, bank checks, and promissory notes, made after the passage of this Act, be treated and considered, as the first day of the week

commonly called Sunday, and as public holidays or half-holidays; and all such bills, checks and notes otherwise presentable for acceptance or payment on any of the said days shall be deemed to be payable and be presentable for acceptance or payment on the secular or business day next succeeding such holiday; but in the case as a half-holiday shall be presentable for acceptance or payment at or before twelve o'clock noon of that day. Provided, however, that for the purpose of protesting or otherwise holding liable any party to any bill of exchange, check or promissory note, and which shall not have been paid before twelve o'clock at noon on any Saturday, a demand of acceptance or payment thereof may be made and notice of protest or dishonor thereof may be given on the next succeeding secular or business day. And provided, further, that when any person shall receive for collection any check, bill of exchange or promissory note, due and presentable for acceptance or payment on any Saturday, such person shall not be deemed guilty of any neglect or omission of duty nor receive any liability in not presenting for payment or acceptance or collecting such check, bill of exchange or promissory note on that day. And provided, further, that in construing this section every Saturday, unless a whole holiday as aforesaid, shall until twelve o'clock noon be deemed a secular or business day. And the days and half-days aforesaid shall be considered as the first day of the week, commonly called Sunday, and as public holidays or half-holidays, for all purposes whatsoever as regards the transaction of business in the public offices of this State, or counties of this State. On all other days, or half-days, excepting Sundays, such offices shall be kept open for the transaction of business. (Laws of 1887, chap. 289; Rev. Stat. ed. 1889, p. 2505-6.)

§ 2. Whenever the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July or the twenty-fifth day of December shall fall upon Sunday, the Monday next following shall be deemed a public holiday for all or any of the purposes aforesaid; provided, however, that in such case all bills of exchange, checks and promissory notes, made after the passage of this Act which would otherwise be presentable for acceptance or payment on the said Monday shall be deemed to be presentable for acceptance or payment on the secular or business day next succeeding such holiday. (Laws of 1887, chap. 289; Rev. Stat. ed. 1889, p. 2506.)

Until restrained by statute, the courts of New York required the demand for payment of paper subject to grace, to be made on the day before the holiday: *Ransom v. Mack* (1842), 2 Hill 587, 592; *Cuyler v. Stevens* (1830), 4 Wend. 566, 567; *Lewis v. Burr* (1796), 2 Caines Cases in Error 195.

The New York Statutes also provide—

§ 3. No person shall fire, or discharge any gun, pistol, rocket, squib, cracker, or other firework, within a quarter of a mile of any building, on the twenty-fifth day of December, on the last day of December, on the first day of January, or on the twenty-second day of February, in any year; nor on the fourth day of July, or such other day, as shall, at the time, be celebrated as the anniversary of American independence, without the order of some officer of the militia, while in the cause of military exercises; every person offending against these provisions,

shall forfeit the sum of five dollars, to be recovered by any person who will prosecute in the name of the overseers of the poor, with their consent and under their direction, for the use of the poor. (1 R. L. 49; 4 Rev. Stat. ed. 1889, p. 2217.)

§ 1. All bills of exchange and promissory notes made after the passage of this Act, except those payable at sight, or on demand, which shall be otherwise payable on any half-holiday Saturday, shall be deemed to be and shall be payable on the next succeeding secular or business day. (Laws of 1887, chap. 461; 4 Rev. Stat. ed. 1889, p. 2506.)

§ 2. All bills of exchange, checks and promissory notes made after the passage of this Act, which by the terms thereof shall be payable on the first day of the week commonly called Sunday, shall be deemed to be and shall be payable on the next succeeding secular or business day. (Id.)

§ 5. No Court shall be opened, or transact any business, in any city or town, on the day such [general] election shall be held therein, unless it be for the purpose of receiving a verdict or discharging a jury; and every adjournment of a Court in such city or town, on the day next preceding the day any such election shall be held therein, shall always be to some other day than the day of such election, except such adjournment as may be made after a cause has been committed to a jury. But this section shall not prevent the exercise of the jurisdiction of any single magistrate, when it shall be necessary in criminal cases to preserve the peace, or to arrest the offenders. (Rev. Stat. ed. 1889, p. 410.)

CHAP. 198. AN ACT supplementary to chapter 289 of the laws of 1887, etc., (approved April 26, 1889.)

SECTION 1. The Governor, in issuing any proclamation or proclamations, appointing or recommending any day or days as a day or days of thanksgiving, or fasting and prayer, or other religious observance, under or in pursuance of chapter 289 of the laws of 1887, and the acts amendatory thereof, is authorized, in his discretion, to limit or restrict the effect and operation of such proclamation or proclamations, to any city or cities, county or counties, to be designated by him in such proclamation or proclamations, and the day or days so appointed or recommended for the purposes aforesaid, shall be deemed to be public holidays for the purposes mentioned in said Act only within the city or cities, county or counties, so specified in such proclamation or proclamations. (Laws, p. 34.)

The Code of North Carolina, enacted March 2, 1883, provides—

SEC. 3784. The first day of January, twenty-second day of February, tenth day of May, twentieth day of May, fourth day of July, and the day appointed by the Governor as a thanksgiving day, and the twenty-fifth day of December of each and every year, are declared to be public holidays; and whenever any such holiday shall fall upon Sunday, the Monday following shall be a public holiday, and papers due on such Sunday shall be payable on the Saturday preceding; and papers which would otherwise be payable on said Monday, shall be payable on the Tuesday thereafter. (Chap. 61, p. 574.)

SEC. 3785. Whenever either of the above-named days falls on Saturday, the papers due on the Sunday following, shall be payable on the Monday succeeding. (Id.)

SEC. 3786. Whenever either of the above-named days shall fall on Monday, the papers which should otherwise be payable on that day, shall be payable on the Tuesday succeeding. (Id.)

The Revised Statutes of Ohio (ed. 1890, Vol. 1), provide—

SEC. 3177. The following days, namely, the first day of January, the fourth day of July, the twenty-fifth day of December, the twenty-second day of February, the thirtieth day of May, and any day appointed and recommended by the Governor of the State or the President of the United States, as a day of fast or thanksgiving, shall for all purposes whatsoever of presentment for payment or acceptance and the protesting or the giving of notice of nonacceptance or of nonpayment of all such instruments, be considered as the first day of the week; but if the first day of January, the fourth day of July, the twenty-fifth day of December, or the twenty-second day of February, or the thirtieth day of May, be the first day of the week, the succeeding Monday shall for the same purpose be considered as the first day of the week. (p. 780.)

SEC. 4015. Teachers employed in the common schools, may dismiss their schools, without forfeiture of pay, on the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the twenty-fifth day of December, and on any day set apart by proclamation of the President of the United States, or the Governor of this State, as a day of fast or thanksgiving. (p. 1013.)

Oregon enacts (Codes and Gen. Laws, ed. 1887)—

§ 928. The courts of justice may be held, and judicial business transacted, on any day, except as provided in this section. No court can be opened, nor can any judicial business be transacted, on a Sunday, on the first day of January, on the first Saturday in June, on the fourth day of July, on Christmas day, on the thirtieth day of May, on a day on which a general election is held, or on a day appointed by the executive authority of the United States or of this State as a day of fasting or thanksgiving, except for the following purposes: 1. To give instructions to a jury then deliberating on their verdict. 2. To receive the verdict of a jury. 3. For the exercise of the powers of a magistrate in criminal actions, or in proceedings of a criminal nature. (p. 86.)

§ 3543. The following days shall be, and are hereby declared legal holidays in this State, viz: Every Sunday, the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the twenty-fifth day of December, and every day appointed by the President of the United States, or by the Governor of this State, for a public fast, thanksgiving, or holiday. Negotiable instruments payable on a holiday become due the next business day. (p. 1539.)

§ 3544. The first Saturday in June of each and every year be, and the same is hereby set apart and declared to be a public holiday under the name of Labor day. (p. 1539.)

§ 519. The time within which an act is to be done, as provided in this code, shall be computed by excluding the first day and including the last, unless the last day fall upon a Sunday, Christmas, or other nonjudicial day, in which case the last day shall also be excluded. (p. 466.)

Pennsylvania provides for her legal holidays, by a series of Acts of Assembly—

No. 374. AN ACT, etc. (Approved, April 11, 1848.)

SECTION 3. Payment of all notes, checks, bills of exchange or other instruments negotiable by the laws of this commonwealth, and becoming payable on Christmas day, or the first day of January, the fourth day of July, or any other day fixed by the law, or by the proclamation of the Governor of this commonwealth as a day of general thanksgiving, or for the general cessation of business in any year, shall be deemed to become due on the secular day next preceding the aforementioned days respectively; on which said secular days demand of payment may be made, and in case of nonpayment or dishonor of the same, protest may be made and notice given in the same manner as if such notes, checks, bills of exchange or other instruments fell due on the day of such demand, and the rights and liabilities of all parties concerned therein shall be the same as in other cases of like instruments legally proceeded with. *Provided*, That nothing herein contained shall be so construed as to render void any demand, notice or protest made or given as heretofore, at the option of the holder, nor shall the same be so construed as to vary the rights or liabilities of the parties to any such instruments heretofore executed. (P. L. p. 539.)

Washington's Birthday was made a legal holiday by the Act of May 7, 1864, P. L. 889, which used identical language with that fixing the other days, as above.

No. 26. AN ACT to declare Good Friday, a public holiday. (Approved, April 12, 1869.)

SECTION 1. *Be it enacted, etc.*, That from and after the passage of this Act, Good Friday, in each and every year, shall be deemed and proclaimed as a public holiday, and shall be duly observed as such; the payment of all notes, checks, bills of exchange or other instruments negotiable by the laws of this commonwealth and becoming due on said Good Friday, shall be deemed to become due on the secular day next preceding the aforementioned day [etc., literally as in the Act of 1848, *supra*]. (P. L. 26.)

Not content with this plain enumeration of holidays, the legislature proceeded to pass (without the repealing clause which might have given some excuse)—

No. 34. AN ACT defining what days shall constitute legal holidays. (Approved, April 2, 1873.)

SECTION 1. *Be it enacted, etc.*, That the following days, namely: First day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and any day appointed or recommended by the Governor of this State, or the President of the United States, as a day of fasting or thanksgiving, or for the general cessation of business, shall be regarded as legal holidays, and shall, for all purposes whatsoever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks, drafts and promissory notes, made after the passage of this

Act, be treated and considered as is the first day of the week commonly called Sunday.

SECTION 2. Whenever the first day of January, twenty-second day of February, the fourth day of July, or the twenty-fifth day of December, shall, either of them, occur on Sunday, the following day, Monday, shall be deemed and declared a public holiday; and all bills of exchange, bank checks, drafts or promissory notes falling due on either of the Mondays, so observed as a holiday, shall be due and payable on the Saturday preceding such holidays; and such Mondays, so observed, shall for all purposes whatever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks, drafts and promissory notes, made after the passage of this Act, be treated and considered as is the first day of the week commonly called Sunday.

SECTION 3. Nothing in this Act shall prevent the making or demand of any promissory note, draft, checks and bills of exchange, falling due on said Mondays, thus observed as holidays, on the day upon which such bills of exchange, drafts, checks and promissory notes shall be due. (P. L. 58.)

This Act omits Good Friday, but the holiday remains, as there is no repealing clause, or other indication that the number of days was to be diminished.

Decoration Day was next made a holiday with the peculiarity of celebration on the previous day, when the thirtieth of May falls on Sunday, instead of the following day, as is the case with all other legal holidays in Pennsylvania, by—

No. 145. AN ACT making decoration day a legal holiday. (Approved, May 25, 1874.)

SECTION 1. *Be it enacted, etc.,* That the thirtieth day of May, commonly called decoration day, or when that day falls on the first day of the week, the day preceding it, shall be a holiday.

SECTION 2. It shall be lawful to require payment of all notes, checks and bills of exchange due and payable on such holidays, to be made on the secular day next previous thereto; and in default of such payment, the same may be protested, and such protest shall be as valid as if made on the day on which such note, check or bill became due by its own terms. (P. L. 222.)

No. 122. AN ACT to regulate the computation of time, under statutes, rules, orders and decrees of court, and under charters and by-laws of corporations, public and private. (Approved, June 20, 1883.)

SECTION 1. *Be it enacted, etc.,* That where by any existing law or rule of court, or by any law or rule of court that may hereafter be enacted and made, the performance or doing of any act, duty, matter, payment or thing shall be ordered and directed, and where any court shall, by special or other order, direct the performance or doing of any act, matter, payment, sentence or decree, and the period of time or duration for the performance or doing thereof shall be prescribed and fixed, such time in all cases shall be so computed as to exclude the first, and

include the last days of any such prescribed or fixed period, or duration of time: *Provided*, that whenever the last day of any such period shall fall on Sunday, or on any day made a legal holiday by the laws of this Commonwealth, or of the United States, such day shall be omitted from the computation: *and provided*, That this Act shall not apply to the payment of negotiable paper.

SECTION 2. The provisions of this Act shall also apply to the ordinances, resolutions, by-laws and other regulations of all municipal or other public or private corporations now existing or hereafter created. (P. L. 136.)

By Joint Resolution of the Legislature, originating in the House of Representatives, concurred in by the Senate and approved by the Governor, March 30, 1887, it was—

Resolved (if the Senate concur), That the Governor of this Commonwealth be requested to appoint, annually, a day to be designated as Arbor Day, in Pennsylvania, and to recommend, by proclamation, to the people, on the days named, the planting of trees and shrubbery in the public school grounds and along public highways throughout the State. (P. L. 431.)

No. 51. AN ACT making the first Monday of September, in each year, a legal holiday, to be known as "Labor holiday." (Approved April 25, 1889.)

SECTION 1. *Be it enacted, &c.*, That the first Monday of September, in each year, after the passage of this Act, shall be a holiday to be known as "Labor holiday."

SECTION 2. It shall be lawful to require payment of all notes, checks and bills of exchange due and payable on such holiday to be made on the secular day next previous thereto, and in default of such payment, the same may be protested, and such protest shall be as valid as if made on the day on which such note, check or bill became due by its own terms. (P. L. 49.)

Rhode Island enacts (Pub. Stat., ed. 1882)—

SEC. 8. The fourth day of July, Christmas day, the twenty-second day of February, and the thirtieth day of May, commonly called Memorial day, or whenever either of the said days falls on the first day of the week, the day following it, and such other days as the Governor or General Assembly of this State, or the President or Congress of the United States, may appoint as days of thanksgiving or days of solemn fast, shall be holidays. (p. 343, as amended by Laws of 1886, ch. 573, p. 154.)

SEC. 9. It shall be lawful to require payment of all notes, checks, and bills of exchange due and payable on such holidays, to be made on the secular day next previous thereto; and, in default of such payment, the same may be protested and such protest shall be as valid as if made on the day on which such note, check or bill became due by its own terms. (p. 344.)

SEC. 15. The supreme court and court of common pleas shall be always open, except on Sundays and legal holidays, for the transaction of all business, except jury trials, the passing of sentence upon persons convicted of any crime or offence, and trial of petitions for divorce, and entering final decrees. (p. 515.)

CHAP. 641. AN ACT establishing "Arbor Day." (passed May 6, 1887.)

SECTION 1. Such day as the Governor of the State may appoint as "Arbor Day," shall be a holiday, but it shall not be lawful to require payment of notes, checks and bills of exchange, due and payable on said holiday, to be made on the day next previous thereto. (Laws, p. 210.)

South Carolina provides (Gen. Stat., ed. 1882)—

SEC. 1636. National thanksgiving days, and all general elections, the first day of January, the twenty-second day of February, the fourth day of July, and the twenty-fifth day of December, shall be legal holidays. (p. 484.)

Tennessee enacts—

CHAPTER 172. AN ACT to appoint an Arbor Day for the public schools of the State, to encourage the planting of trees about the public school buildings, that the grounds may be beautified and made more attractive, and the minds of the young impressed with the importance of the subject. (Approved March 26, 1887.)

SECTION 1. *Be it enacted, &c.*, That it shall be the duty of the County Superintendent of Public Schools of each county to set apart some day in November in each year as "Arbor Day" in all the public schools of the county, that trees may be planted around the buildings that the grounds around such buildings may be improved and beautified; such planting to be attended with appropriate and attractive ceremonies, that the day may be one of pleasure as well as of instruction for the young, all to be under the supervision and direction of the teacher, who shall see that the trees are properly selected and set. (Laws, p. 297.)

CHAPTER 63. AN ACT to establish and fix certain days as legal holidays amending Section 1966 of the Code, (being Section 2723 of the compilation of the laws by Milliken and Vertrees) prescribing the time when negotiable paper falling due on any legal holiday shall be due and payable, and defining certain days as legal holidays. (Approved March 16, 1889.)

SECTION 1. *Be it enacted, etc.* That the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, Good Friday, Decoration Day, Memorial Day, and when either of these days fall on Sunday, then the following Monday to be substituted; also all days appointed by the Governor of this State, or by the President of the United States, as days of fasting and thanksgiving, and all days set apart by law for holding County, State or National elections throughout the State are made holidays, on which all public offices of this State may be closed and business of every character, at the option of the parties in interest or managing the same, may be suspended. (Laws, p. 92.)

SEC. 2. *Be it further enacted*, That in order to remove any impediments in the way of the observance of any of said days named in the first section of this Act as holidays, all negotiable paper falling due on either of said days shall be due and payable the first business day preceding the same. (Id.)

Texas Revised Civil Statutes (ed. 1888) provide—

ART. 2835. The first day of January, the twenty-second day February, the second day of March, the twenty-first day of April, the fourth day of July, the twenty-fifth day of December of each year, and all days appointed by the President of the United States, or by the Governor, as days of fasting or thanksgiving, and every day on which an election is held throughout the State, are declared holidays, on which all the public offices of the State may be closed, and shall be treated and considered as Sunday, or the Christian Sabbath, for all purposes regarding the presenting for payment or the acceptance and of protesting for and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes placed by the law upon the footing of bills of exchange. (Tit. 49, p. 876.)

ART. 2836. All the exemptions and requirements usual on legal holidays may be observed on the days above named. (Id.)

ART. 2837. If any of the days named shall occur on Sunday, the next day thereafter shall be observed as a holiday; but bills of exchange, or other paper, may be presented for payment, or acceptance, on the Saturday preceding such holiday, and proceeded on accordingly. (Id.)

ART. 1184. No civil suit shall be commenced, nor shall any process be issued or served, on Sunday, or on any legal holiday, except in case of injunction, attachment or sequestration. (Tit. 29, ch. 1, p. 398.)

Vermont Revised Laws (ed. 1880) provide—

SEC. 2010. The first day of January, the fourth day of July, the thirtieth day of May, the twenty-fifth day of December, and a day appointed by the Governor of this State, or by the President of the United States as a day of fast or thanksgiving, shall for purposes of presenting for acceptance or payment, and for protesting, and giving notice of the dishonor of bills of exchange, drafts, checks, and promissory notes, be considered like Sunday. (p. 412.)

SEC. 2011. When a bill, note or other contract, not subject to grace, falls due on Sunday, or a legal holiday, it shall, for every purpose, be considered as due on the next following business day. (p. 413.)

SEC. 2012. When a bill, note or other contract subject to grace falls due on Sunday, or a legal holiday, it shall for every purpose be considered as due on the next preceding business day. (p. 413.)

NO. 28. AN ACT relating to the rights of teachers to legal holidays. (Approved, November 20, 1886.)

SECTION 1. No teacher in any public school in this State shall be required to teach or perform service in any such school on any day made a legal holiday by the laws of this State, nor shall any such teacher be subjected to any deduction from their time, or the payment for the same, on account of not teaching on such legal holiday. (Laws, p. 24.)

Virginia enacts (Code of 1887)—

SEC. 2844. The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and any day recommended or appointed by the Governor of this State, or the President of the United States, as a day of thanksgiving, or of fasting and prayer, or other religious observance,

shall, for all purposes whatsoever, as regards the presenting for acceptance or payment, and of protesting and giving notice of the dishonor of any bill of exchange, bank check, negotiable note, or other negotiable instrument, hereafter made, be considered and treated as a Sunday and a public holiday; and every such bill, check, note, or other negotiable instrument which would otherwise be presentable for acceptance or payment on any such holiday or on a Sunday, shall be deemed to be presentable for acceptance or payment on the secular or business day next preceding such holiday or Sunday. Whenever any such holiday shall fall on a Sunday, the Monday next following shall be deemed a public holiday, for any and all the purposes aforesaid; and in that case, every such bill, check, note, or other negotiable instrument, hereafter made, which would otherwise be presentable for acceptance or payment on the said Monday, shall be deemed to be presentable for acceptance or payment on the business or secular day next preceding. (p. 682.)

SEC. 2845. When any bill, check, negotiable note, or other negotiable instrument, is presentable for acceptance or payment, under the preceding section or otherwise, on the secular or business day next preceding a Sunday or any other day declared in the preceding section to be a public holiday, notice of the protest or dishonor thereof need not be given until the first day thereafter which is not a Sunday or any such public holiday. (Id.)

SEC. 2847. If the day following that on which such bill shall become due shall happen to be a Sunday, the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, or any day appointed or recommended by the Governor of this State, or the President of the United States, as a day of thanksgiving, or fasting and prayer, or other religious observance, it shall not be necessary to present it or forward it for presentment for payment to such acceptor for honor or referee, until the first day afterwards which is not a Sunday or one of the other days above mentioned. (Id.)

Washington Code of 1881 provides—

SEC. 2301. The fourth day of July and the twenty-fifth day of December, shall for all purposes whatsoever as regards the presenting for payment or acceptance and of the protesting and giving notice of the dishonor of bills of exchange, promissory notes, drafts and checks, be treated and considered as Sunday. (p. 397.)

West Virginia (Code, ed. 1887) provides—

31. In contracts with teachers, it shall be understood that the school is not to be kept in operation for ordinary instruction on the first day of January, fourth day of July, or the twenty-fifth day of December, nor on any national or state festival or thanksgiving day; but the month or time mentioned in such contract shall nevertheless be computed as if the said days were included. (p. 374.)

3. A bill or note which becomes due on a Sunday shall be payable and may be protested, on the preceding day; and a bill or note which becomes due on, a Christmas day, or the first day of January, or the twenty-second day of February, or the fourth day of July, or a day of national thanksgiving, shall be payable, and may be protested on the preceding day, or if that be Sunday, then on the preceding Saturday, and a bill or note which becomes due on a day after a Sunday, which

is a Christmas day, or the first day of January, or the twenty-second day of February, or the fourth day of July, shall be payable and may be protested, on the preceding Saturday. (p. 699.)

4. When a bill or note is protested, either under the preceding section or otherwise, on the day preceding any Sunday, Christmas day, first day of January, twenty-second day of February, fourth day of July, or a day of national thanksgiving, notice of the dishonor thereof need not be given until the next day afterwards, which is not Sunday, Christmas day, or the first day of January, twenty-second day of February, fourth day of July, or a day of national thanksgiving, and is not the day after a Sunday which is a Christmas day, or the first day of January, or the twenty-second day of February, or the fourth day of July. (p. 700.)

6. If the day following that on which such bill shall become due shall happen to be a Sunday, or Christmas day, or the first day of January, or the twenty-second day of February, or the fourth day of July, or a day of national thanksgiving, then it shall not be necessary to present it or forward it for presentment for payment to such acceptor for honor or referee, until the first day afterwards, which is not Sunday, or Christmas day, or the first day of January, twenty-second day of February, fourth day of July or a day of national thanksgiving, and is not the day after a Sunday, which is a Christmas day, or the first day of January, or the twenty-second day of February, or the fourth day of July. (Id.)

Wisconsin (Annotated Statutes, 1889) provides—

SECTION 2576. No court shall be opened, or transact any business, on the first day of the week, or on any legal holiday, unless it be for the purpose of instructing or discharging a jury, or of receiving a verdict, and rendering a judgment thereon, but this section shall not prevent the exercise of the jurisdiction of any magistrate, when it shall be necessary, in criminal cases, to preserve the peace, or arrest offenders. Whenever it shall happen, that the time fixed by law for holding any term of court of record shall be upon a legal holiday, the clerk of such court, or the judge thereof, shall open and adjourn the same until the next day, and all matters returnable on that day, shall be continued until such next day. (Vol. 2, p. 1468-9.)

SECTION 2577. The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, the thirtieth day of May, the day appointed by the Governor of this State, or the President of the United States, as a day of public thanksgiving, and the day of holding the general election in each year, are legal holidays; and whenever either of said days shall fall on Sunday, the succeeding Monday is a legal holiday. (Vol. 2, p. 1469.)

SECTION 459. In settlement for wages, between teachers and district boards, or other employers of teachers in public schools, twenty days of teaching shall constitute a school month, unless it be otherwise specified in the contract; and all legal holidays, occurring on school days, shall be counted, although no school be taught; but school taught on a legal holiday, shall not be counted for two school days, and no Saturdays shall be counted. The district board may, in their discretion, give to any teacher employed, without deduction from his wages therefor, the whole, or any part of his time spent by him, in attending the sessions of any institute held in the county, embracing the school district or any part thereof, upon such teacher's

furnishing to the district clerk, to be filed by him, a certificate of regular attendance in such institute, signed by the person conducting the same. (Vol. 1, p. 309.)

SECTION 1684. All notes, drafts, bills of exchange, or other negotiable paper, maturing on Sunday, or upon any legal holiday, shall be due and payable on the next preceding secular day. (Vol. 1, p. 997.)

SECTION 2775. * * * In case of exigency, any injunction may be granted, and by direction of the court or judge, may be served on Sunday, or on a legal holiday. (Vol. 2, p. 1606.)

SECTION 137 b. The Governor is hereby authorized to set apart, by proclamation, one day in each year, to be observed as a tree planting, or arbor day, requesting all public schools and colleges, to observe the same by suitable exercises, having for their object, the imparting of knowledge of horticulture, in the department known as arboriculture, and the adornment of school and public grounds. (Vol. 1, p. 188.)

DRUMMOND, J., gives the following history of the Statutes of Wisconsin—

The statute in relation to the 22d of February and 4th of July, was passed in 1861; but when there was legislation, in 1862, as to the 25th of December and 1st of January, there was no prohibition in relation to the Courts, except what might be inferred from the fact that they were declared holidays. It was not till afterwards (1869) that it was declared that when the day for the meeting of the Court should fall upon a legal holiday, it should adjourn to the following day.

The natural conclusion would seem to be, that when the State Legislature, in 1861, legislated in relation to the 22d of February and 4th of July, and made prohibitions, and then again legislated, in 1862, as to the 25th of December and 1st of January, the prohibitions should not, by construction merely, be enlarged

* * * There does not seem to be any Statute of this State, which, when fairly considered, declares that no official Act shall be performed on a holiday. In referring to holidays, I do not intend to include Sundays, as to which there is considerable prohibitory legislation by this State, affecting business, public and private labor, amusements, and the service of civil process: (DRUMMOND, J. *In re Worthington* (1877), U. S. Cir. Ct., W. Dist. Wis. 7 Biss. 457, 458, 459.)

Wyoming Revised Statutes, in force January 1, 1887, provide—

SEC. 1430. The first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the day that may be appointed by the President of the United States as the annual thanksgiving day, and the twenty-fifth day of December of each and every year, are hereby declared legal holidays in and for the Territory of Wyoming. (p. 394.)

Wyoming also by an Act relating to negotiable instruments, and for other purposes, approved March 9, 1888, provides—

SEC. 66. The first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the twenty-fifth day of December,

and any day appointed by the Governor of the Territory or the President of the United States, as a day of fast or thanksgiving, and any other day made a legal holiday by law, shall for all purposes whatsoever of presentment for payment, presentment for acceptance, and the protesting or the giving of notice of non-acceptance, or of non-payment, of all negotiable instruments, be considered as legal holidays; and if the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, or the twenty-fifth day of December, or any other legal holiday shall fall upon Sunday, the Monday following shall be a legal holiday within the meaning of this article. (Laws, p. 153.)

SEC. 62. Except as otherwise provided in this article, the three days following the day on which a negotiable instrument becomes due by its terms, are allowed as days of grace, unless the last of such days is Sunday or a legal holiday, in which case the next preceding business day shall be the last day of grace allowed. (Id.)

SEC. 65. A negotiable instrument, on which days of grace are not allowed, which by its terms matures on Sunday or on a legal holiday, is payable on the next preceding business day. (Id.)

CHAPTER 87. AN ACT authorizing the Governor to designate arbor day and encourage tree planting. (Approved March 9, 1888.)

SECTION 1. The Governor shall annually, in the spring, designate by official proclamation, an arbor day, to be observed by the schools, and for economic tree planting, and the same shall be a legal holiday. (Laws, p. 183.)

IX. SUMMARY OF THE STATUTES.

A proper conclusion to the several statutes themselves will be a classification and review of some of their provisions, with a view to ascertain their uniformity. And, *first*, the enquiry is, what days are accounted legal holidays?

January First, or New Year's Day, is a legal holiday in all the States, except Arizona, Arkansas, Kentucky, Massachusetts, New Hampshire, Rhode Island, Utah and Washington.

January Eighth, or the Anniversary of the Battle of New Orleans, is a legal holiday in Louisiana alone.

February Third, see *Shrove Tuesday*, *infra*.

February Twelfth is a legal holiday in Louisiana.

February Twenty-Second, or Washington's Birthday, is a legal holiday in all the States, except Arizona, Arkansas, Iowa, Kansas, Mississippi, New Mexico, Utah and Washington (!).

March Second, or the Anniversary of Texan Independence, is a legal holiday in that State alone.

March Twentieth, see *Good Friday*, *infra*.

April Twenty-first is a legal holiday in Texas only.

April Twenty-second, or Arbor Day, *supra*, p. 154.

April Twenty-sixth, known as Decoration Day in the States where it is observed, is a legal holiday in Alabama and Georgia.

May Tenth is a legal holiday in North Carolina alone.

May Twentieth, or the anniversary of the Mechlenberg Declaration of Independence, is a legal holiday in North Carolina alone; as Memorial Day is a legal holiday in Tennessee.

May Thirtieth, or Decoration Day, is a legal holiday in all the States, except Alabama, Arizona, Arkansas, Maryland, Mississippi, Missouri, Montana, New Mexico, North Carolina, South Carolina, Texas, Utah, Virginia, Washington and West Virginia.

June (the first Saturday in), is a legal holiday in Oregon under the name and title of Labor Day.

July Fourth, or Independence Day, is a legal holiday in all the States and Territories, except Arizona and Utah.

September First, or Labor Day, is a legal holiday in

Massachusetts,
Nebraska,

New York,

[Oregon (*supra*).]
Pennsylvania.

September Ninth is a legal holiday in California.

December Twenty-fifth, or Christmas Day, is a legal holiday in all the States and Territories, except Arizona.

Arbor Day is merely observed in Pennsylvania, Illinois and Michigan (see the statute) when proclaimed by the Governor, but is a legal holiday in

Colorado, (for schools)	.	.	.	Third Friday in April.
Idaho,	.	.	.	Last Monday of April.
Nebraska,	.	.	.	Twenty-second of April.
Nevada, (for schools)	.	.	.	Day appointed by the Governor.
Rhode Island, (except for bills and notes)	.	.	.	"
Tennessee, (for schools)	.	.	.	Day appointed County Superintendent.
Wisconsin,	.	.	.	Day appointed by the Governor.
Wyoming, (see the statute)	.	.	.	"

Election Day, when the election is held throughout the State, is a legal holiday in

California,	Maryland,	New Jersey,
Dakota,	Massachusetts, (see the statute)	New York,
Florida,	Missouri,	Oregon,
Idaho,	Montana,	South Carolina,
Illinois,	Nevada,	Tennessee,
Indiana, (see the statute)	New Hampshire,	Texas,
Maine, (see the statute)		Wisconsin.

Fast Day, annual or special, is a legal holiday in

California,	Kansas,	New Mexico,
Colorado,	Kentucky,	New York,
Connecticut,	Maine,	Ohio,
Dakota,	Maryland,	Oregon,
District of Columbia,	Massachusetts,	Pennsylvania,
Florida,	(See p. 141 <i>supra</i>)	Rhode Island,
Georgia,	Michigan,	Tennessee,
Idaho,	Montana,	Texas,
Illinois,	Nebraska,	Vermont,
Indiana,	New Hampshire,	Virginia,
Iowa,		Wyoming.

Good Friday, which may happen as early as the twentieth of March, and as late as the twenty-third of April (see the Tables in the front of the Book of Common Prayer), is a legal holiday in

Alabama,	Maryland,	Minnesota,
Louisiana,		Pennsylvania.

Inauguration Day, when the President of the United States takes his oath of office, is a legal holiday in the District of Columbia.

Saturday Afternoon holidays are established by law in New York.

Shrove Tuesday, or *Mardi Gras*, is a legal holiday in Alabama and Louisiana.

Special days set apart by the Governor of the State, or by the President of the United States, and generally for religious observances, in

Dakota,	Nebraska,	Oregon,
Florida,	New Hampshire,	Pennsylvania,
Georgia,	New Jersey,	Rhode Island,
Idaho,	New Mexico,	Tennessee,
Maryland,	New York, (see the statute)	Texas,
Massachusetts,	Ohio,	Virginia,
Michigan,		Wyoming.

Thanksgiving Day is a legal holiday in all the States and Territories, except Arizona, Arkansas and Utah.

Holidays are generally appointed by the President of the United States, or the Governor of the State, but *Georgia* is unique in also allowing "any municipal authority" to appoint days of "thanksgiving, or fasting and prayer, or other religious observances." So far as localizing the holiday, *New York* now authorized her governor to limit religious observances to particular places or sections.

Second, the enquiry may be, on what day is a variable holiday to be held, when it would happen on a Sunday? It is transferred to the following Monday in all except the following States; that is, *Arizona* and *Arkansas*; but *Pennsylvania* is unique in following the general rule in all cases except when the thirtieth of May falls upon a Sunday, then Decoration Day is observed on Saturday the twenty-ninth. *Rhode Island* agreed with *Pennsylvania* until 1886.

Appeals are to be entered in *Georgia*, within four days after the adjournment of the Court in which the judgment was entered, but Sundays and legal holidays are excluded from the computation: See page 142.

Appearance in Court, on a legal holiday is expressly excused, by statute in *Iowa*.

Court, or law, days are expressly transferred by statute to the next law day, when falling upon a legal holiday in *Colorado* and *Michigan*.

Days of Public Rest is the statutory term in *Louisiana* for legal holidays.

Judicial proceedings are forbidden, with certain limitations in

California,	Michigan, (see the statute)	Nevada,
Colorado,	Montana,	Oregon,
Maine,	Nebraska,	Rhode Island,
Massachusetts,		Wisconsin.

Legislative action in the form of ordinary business is forbidden in *Massachusetts*.

Liquor Dealers are restrained in their sales, on certain holidays, in Massachusetts, Michigan and New York (on election days).

Process may be issued and served on a legal holiday, by express statutory provisions, in Colorado. On the other hand the service of process on a legal holiday is expressly prohibited in Louisiana, Minnesota, Missouri and Texas.

Public Offices are directed to be closed, on a legal holiday, in

Kentucky,
Massachusetts,

Minnesota,

New York,
Tennessee.

Quiet is secured upon many holidays, by special statutory provisions, in Connecticut.

Sundays are improperly classed with holidays, in

Alabama,
California,
Dakota,

Florida,
Idaho,
Indiana,

Iowa,
Louisiana,
Oregon.

Recurring to the new definition at the bottom of page 141, the propriety of placing religious observances first, will appear from the summary of the statutes. Yet it is equally clear that no effort has been made in recent years to secure any Sabbatical observance of (e. g.) Good Friday. All that has been desired is such freedom from monetary transactions, as by the closing of the banks and cessation of business directly dependent thereon, may allow of choice in the method of passing the day. The addition of days of political or social significance, leads to no proper confusion of thought, but rather serves the more sharply to distinguish the weekly *dies non* as one founded upon a natural law of regular recurrence, whose violation appeals to more than the mere legislative punishments.

JOHN B. UHLE.

RECENT AMERICAN DECISIONS.

Supreme Court of California.

BARRETT v. MARKET ST. C. RY. CO.

The rules and regulations of a carrier of passengers must be reasonable, and the carrier must deal in a reasonable manner with the persons carried.

It would be unreasonable for a street railway company to require passengers upon its cars to tender the exact fare charged, and to refuse to make change for notes or coin of a reasonable amount.

The tender of a five dollar gold piece or legal tender note is not unreasonable, and a railway company is bound to supply its conductors with sufficient money to change a coin or note of that denomination.

A distinction as to what is a reasonable tender, exists between railroads, where passengers may pay their fares at a ticket office, and street railways, where they are obliged to pay upon the cars.

Appeal from Superior Court, City and County of San Francisco.

W. H. L. Barnes, for appellant.

Stanley, Stoney & Hayes, for respondent.

PATTERSON, J., November 26, 1889. Action for damages for the forcible ejection of plaintiff from one of defendant's cars. The defense was that the plaintiff had refused to pay his fare, and that, therefore, the defendant was justified in ejecting him. The trial court gave judgment for the plaintiff, and the defendant appeals upon the findings. The material portions of the findings are as follows :

"That while in said car, as such passenger, and when said car was near the corner of Second and Market streets, the conductor in charge of said car, on behalf of the defendant, did, in the course of his employment as such conductor, demand of the plaintiff the payment of the sum of 5 cents, being the legal fare and cost of transportation on said car. That said plaintiff did not have in his possession any coin or currency of the exact value of 5 cents, or any coin of any smaller denomination than a \$5 gold-piece, lawful money of the United States, and plaintiff, in response to said demand of said conductor, offered said conductor a \$5 gold-piece, and told said conductor to take his (plaintiff's) fare out of said sum of \$5. That the conductor refused to accept said \$5 gold-piece, informing the plaintiff that he was unable to make change for said \$5 gold-piece, and insisted upon the payment to him by the plaintiff of the exact sum of 5 cents, at the same time directing plaintiff if he did not produce and pay said sum of 5 cents to leave the car. That the plaintiff informed the conductor that the \$5 gold-piece was the smallest coin he had; that he was willing to pay his fare, but could not furnish the exact amount; and refused to leave the car upon the demand of the conductor. That thereupon the conductor stopped said car, and called the driver to his assistance, and both of them thereupon seized the plaintiff, and, against his protest, opposition, and struggles, forcibly ejected him from said car at the corner

of said Second and Market streets, and in so doing inflicted upon plaintiff various bruises and injuries. * * * And the Court finds from the foregoing facts alone that the plaintiff did not refuse to pay fare for his transportation on said car, and did not insist upon any right, or supposed right, to be transported free of charge, under any circumstances or upon any condition, and that plaintiff was not ejected or put out of said car for a refusal to pay his fare. And as a conclusion of law, from the foregoing facts, the Court finds that the plaintiff is entitled to judgment," etc. It is stipulated by counsel "that, if plaintiff were entitled to damages, \$500 was a fair and just estimate thereof."

The question on the merits to which counsel have mainly directed their arguments is whether the passenger was bound to tender the exact fare. It is argued for the appellant, that the rule in relation to the performance of contracts applies, and that the exact sum must be tendered. But we do not think so. The fare can be demanded in advance as well as at a subsequent time: Civil Code, § 2187. And, so far as this question is concerned, we see no difference in principle where the fare is demanded in advance and where it is demanded subsequently. If it be demanded in advance, there is no contract. The carrier simply refuses to make a contract. Consequently, the rule in relation to the performance of contracts, whatever it be, has no necessary application. The obligation of the carrier in such case would be that which the law imposes on every common carrier, viz., that he must, "if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry:" Id. § 2169. This duty, like every other which the law imposes, must have a reasonable performance; and we do not think it would in all cases be reasonable for the carrier to demand the exact fare as a condition of carriage. Suppose that on entering a street-car a person should tender the sum of 10 cents? Would it be reasonable for the carrier to refuse it? Prior to the act of 1878, the usual fare was $6\frac{1}{4}$ cents. In such a case it would be unreasonable for the carrier to demand the exact fare; for there is no coin in the country which would enable the passenger to answer such a demand. It would be impossible for the passenger to furnish such a sum. Consequently, to allow the carrier to maintain such a demand, would be to allow him to refuse to perform the duty which the law imposes upon him. The fare which he is now allowed to charge is no longer the sum mentioned. The act of

1878 forbids him to "charge or collect a higher rate than 5 cents." But there is nothing to prevent a lower rate from being charged. The carrier might fix it at $4\frac{1}{4}$ cents, and in such a case it would be equally impossible for the passenger to comply with such a demand as in the case above put. Consequently, it will not do to lay down the rule that the passenger is obliged to tender the exact fare.

But it does not follow that the passenger may tender any sum, however large. If he should tender a \$100 bill, for example, it would be clear that the carrier would not be bound to furnish change. The true rule must be, not that the passenger must tender the exact fare, but that he must tender a reasonable sum, and that the carrier must accept such tender, and must furnish change to a reasonable amount. The obligation to furnish a reasonable amount of change must be considered as one which the law imposes from the nature of the business. Section 2188 of the Civil Code provides that "a passenger who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier." The question is whether the findings show a refusal to pay,—whether the tender of a \$5 gold-piece was sufficient.

It is claimed by appellant that the establishment of the rule contended for by the respondent would lead to great inconvenience, and make it the duty of the carrier of persons for hire in street-cars to provide its conductors with sufficient small coin to do a general exchange business with all passengers; thus requiring the company to intrust, to a class of employees who are usually of no pecuniary responsibility, large sums of money. It is further said, that if the tender of a \$5 gold-piece is a tender of the amount actually due, and the conductor is bound to receive it and return \$4.95 to the passenger, the same principle would apply to the offer by the passenger of \$10 or \$20 in gold or currency. With the question of convenience, however, we have nothing to do, except in so far as it bears upon the question whether the amount tendered was a reasonable sum, such as the carrier was bound to accept. It does not follow, if it be established as a rule, that \$5 is a reasonable amount to be tendered to a conductor, that \$20 or \$50

is also a reasonable amount, and must be accepted. The fears of the appellant are based upon the assumption that passengers generally will contumaciously, to avoid the payment of fare, and require the companies to carry them free, offer coin of a large denomination. But these fears, we think, can be safely set aside upon the theory that a question like this will, as is usual, settle itself by a spirit of mutual accommodation between carrier and passenger. It is a well-known fact, that the \$5 gold-piece is practically the lowest gold coin in use in this section of the country.

The case upon which the appellant relies, *Fulton v. Grand Trunk Ry. Co.* (1858), 17 U. C. Q. B. 428, is not quite in point. In that case the plaintiff had boarded a train of cars without a ticket, and when asked for his fare declined paying it, as he said he had not made up his mind how far he should go. The conductor told him that he must decide, and afterwards, on his declining again on the same ground, stopped the train and put him off. The plaintiff then tendered the conductor a \$20 gold-piece, telling him to take his fare, \$1.35, out of it. Under these circumstances, the Court very properly held, that the plaintiff had refused to pay his fare, within the meaning of a statute very much like our own, and that the conductor was justified in refusing to carry him further. The Court said—

“The general practice is for the passengers to pay at the office, and get tickets, * * * and a person rushing into a car without a ticket has no reason to expect that he will find the conductor prepared to change a \$20 gold-piece, for he relies upon receiving tickets from the parties, or, if money is to be paid to him instead, that it will be paid with reasonable regard to what is convenient under the circumstances.”

A distinction ought to be made, we think, between passengers traveling on steam railroads and those traveling on street railroads. Passengers of the former class are expected to prepare themselves with tickets procured at the regular office established at the station where the trains regularly stop. Horse-cars and cable-cars stop at all points along the road at the beck of those desiring to ride, and the conductors do not, as a general thing, expect to receive tickets for the passage. Judgment and order affirmed.

We concur : Fox, J.; WORKS, J.

As a general rule, in order to constitute a valid tender, the exact amount due must be offered: 17 AMER. LAW REG. 745,749. The debtor cannot tender a bank note or coin for a larger amount than the debt, and require change to be made: *Betterbee v. Davis* (1811), 3 Camp. 70; *Robinson v. Cook* (1815), 6 Taunt. 336. But while a railway company, by permitting a passenger to board its car without demanding the payment of his fare in advance, actually establishes between itself and him the relation of debtor and creditor, the enforcement of a rule requiring the tender of the exact fare would be impracticable, and such a rule would undoubtedly be pronounced unreasonable by the courts. In *Tarbell v. Central Pacific R. R. Co.* (1868), 34 Cal. 616, the passenger tendered the conductor the amount of his fare in United States legal tender notes. The conductor refused to accept them and demanded coin. This not being produced, the passenger was ejected, and subsequently brought suit for damages. Counsel for the railroad company, while admitting that a common carrier is bound to carry all properly behaved persons on payment or tender of their fare, argued that, before the transportation is completed, there is no "debt" within the meaning of the Legal Tender Acts, on the part of the passenger, and that therefore a tender of United States notes was not sufficient and the company was justified in the ejection. In support of this contention they cited the case of *Perry v. Washburn* (1862), 20 Cal. 318 (approved by the Supreme Court of the United States in *Lane County v. Oregon* (1868), 7 Wall. (74 U. S.) 71, and subsequent cases), where it was held that taxes levied under State authority did not constitute a debt within the meaning of the Legal Tender Acts. But the Court held that "the point that the defendant was not

bound to carry the plaintiff because the fare which he offered to pay was in legal tender notes, is not tenable. *

*. * There being no contract in writing stipulating for coin, we find nothing in the case which takes it out of the operation of the Act of Congress in relation to legal tender notes. Railroad fares are not taxes, and do not fall within the rule in *Perry v. Washburn* (*supra*). Whether the defendant could have legally exacted payment in coin before the plaintiff was admitted into the cars and the journey commenced, is a question not involved in this case, and upon which we express no opinion. Having received the plaintiff and proceeded several miles upon the journey, the defendant must be held to have consented to receive in payment of the fare any good and lawful money which the plaintiff might tender, when called upon for payment. The kind of money to be paid had then ceased to be an open question, for the contract was already made and in process of performance."

To the same effect is the recent case of *Morgan v. Jersey City & B. Ry. Co.*, decided by the Supreme Court of New Jersey, November 13, 1889. There the passenger tendered a silver coin, worn smooth by use. The conductor refused to accept it, and, upon the passenger declining to tender other money, ejected him from the car. Upon the trial of a suit for damages, the Court instructed the jury as follows: "The plaintiff tendered this ten-cent piece, a genuine and recognizable coin of the United States, and that was his lawful fare, provided that you believe that the coin is in the condition in which it was when issued from the mint, except as it has been changed by proper use. If there has been no other abrasion, no other defacement of that coin, except such as it has received in the passing from hand to hand, then it is still, under the laws of the country, a good ten-

cent piece, and was the fare of the plaintiff. If you think it has been otherwise changed, willfully changed, it has ceased to be a lawful coin of the country, and it has ceased to be a lawful tender." The Supreme Court held this instruction to be substantially correct. The opinion is well worth quoting at length: "By the Act of March 3, 1875 (Rev. Stat. U. S. § 3586), the silver coins of the United States shall be a legal tender, at their nominal value, for any amount, not exceeding five dollars, in any one payment. By the Act of January 9, 1879 (Supp. Rev. Stat. U. S. 488), the holder of any of the silver coins of the United States of smaller denomination than one dollar may, on presentation of the same in sums of twenty dollars, or any multiple thereof, at the office of the Treasurer of the United States, receive therefor lawful money of the United States. Section 3 increases the legal tender of silver coin to the sum of ten dollars, instead of five dollars, under the previous statute. In Section 3585 of the Revised Statutes, the gold coins of the United States are made a legal tender in all payments at their nominal value, when not below the standard weight and limit of tolerance for the single piece; and, when reduced in weight below such standard and tolerance, shall be a legal tender at valuation in proportion to their actual weight. The limit of toleration for gold coin referred to is found in Sections 3505 and 3511, to be, when reduced in weight by natural abrasion, not more than one-half of one per centum below the standard weight prescribed by law, after a circulation of twenty-years, as shown by the date of coinage, and at a ratable proportion for any period less than twenty years. This particularity in the limitation and allowance as to gold coin is not found in the case of natural abrasion in silver coins.

This difference is very noticeable and important in a question of statutory construction and legislative intention. It seems by these statutes that, so long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value: *U. S. v. Lissner* (1882), U. S. Circ. Ct. D. Mass., 12 Fed. Repr. 840. The coin in question in this case was shown in court to the jury. It does not appear in the evidence to have been so worn that it was light in weight, or not distinguishable as a genuine dime. With no limitation put upon its circulation by the Government, it would seem that none was intended, so long as it was not defaced, cut, or mutilated, and was only made smooth by constant and long-continued handling, while being circulated as part of the national currency. The instruction was right, as the facts appear, and as the jury found them."

In both the cases cited, the relation subsisting between the carrier and the passenger, after the latter had entered the car without pre-payment of his fare, was recognized to be that of creditor and debtor. Consequently the passenger was required to offer to pay his fare in the legal tender of the country, and the carrier, when such a tender was made, was bound to accept it. As has been already stated, a strict application of the rules of tender, would justify the carrier in refusing to accept anything except the exact amount of the fare. But another principle here comes into play and must be recognized. It is this principle which sustains the ruling in the principal case. *Reasonableness* must characterize all the dealings of a common carrier with its passengers. It has the power to make rules and regulations to guide and govern its agents

in the discharge of their duties and for the conduct of passengers while upon its cars or conveyances, but such rules and regulations must be reasonable: *Wheeler on Carriers*, 130-1-2. "Regulations will be deemed reasonable, which are suitable to enable them (carriers) to perform the duties they undertake, and to secure their own just rights in such employment; and also such as are necessary and proper to insure the safety and promote the comfort of passengers." *Commonwealth v. Power* (1844), 7 Met. (Mass.) 596; *State v. Chovin* (1858), 7 Iowa 204. So also the regulations of the carrier must be enforced in a reasonable manner, and its treatment of its passengers must in all cases be characterized by this same quality of reasonableness. Thus in several cases it has been held that, where a passenger, who has purchased a ticket, but is unable to find it at the moment of the conductor's demand for its production, is entitled to be allowed reasonable time to make search for it: *Maples v. New York & N. H. R. R. Co.* (1871), 38 Conn. 557; *Hayes v. New York Cent. & H. R. R. Co.* (S. Ct. N. Y. 1884), 10 Alb. Law Jour. 469; *International & G. N. R. R. Co. v. Wilkes* (1887), 68 Tex. 617.

A passenger who has neither ticket nor money is also entitled to reasonable time in which to borrow the sum needed from other passengers, if he requests to be permitted to do so: *Curl v. Chicago, R. I. & P. R. R. Co.* (1884), 63 Iowa 417; *Clark v. Wilmington & Weldon R. R. Co.* (1885), 91 N. C. 506.

An interesting case is *Louisville & Nashville R. R. Co. v. Garrett* (1881), 8 Lea (Tenn.) 438. The plaintiff had there boarded a train without ticket or money, but having a tax certificate, which he supposed would be accepted for his fare, but which the conductor refused to receive. The latter also refused to allow him to proceed to the

next station, where he stated that he could get money. As the conductor was ejecting him, another passenger offered to pay the fare, but the conductor would not accept it. The Court said: "The fact of a party getting on a passenger car for the purpose of travel, of itself creates by operation of law a contract, or the law defines the terms of the contract, the obligations of which bind both parties. On the part of the carrier, among other things, the party is entitled to be carried with the care required by law, at the established rates and with no unnecessary delay. On the part of the passenger, he is bound as the first duty to pay, or offer, or be willing to pay his fare according to such reasonable regulations as may be established by the company. Payment, when demanded, is his duty. The receipt of the compensation is the right of the carrier, and this is a condition precedent, without the performance of which he is not bound to perform the service. * * * The principle is, the carrier is bound to carry, but is entitled to his pay—when this is offered, the law imposes the duty. This being conceded, it seems to follow that * * * if another person offered to pay the fare before ejection from the car, the carrier was bound to receive it and transport the passenger. It is unimportant to the carrier from whom the money comes. If it is the proper amount, he gets what he is entitled to, and must perform the duty imposed. * * * To test this further, however, suppose a carrier should make a regulation that none but money from the pocket of the passenger himself should be received by conductors on passenger trains, and if money should be offered by a friend to pay a party's fare, it should be rejected, no one could hesitate to say such a regulation would be void as unreasonable, and beyond the power of the company to make. If such a rule could not be

properly made, the act of a conductor in such a case, without a regulation to that effect, cannot be justified. * * * Public policy, the interest and rights of the public, as well as the known conditions surrounding the business of carrying passengers by railroads in this country, demand that no narrow or technical rules should be prescribed to enable them to exercise any arbitrary authority whatever in the performance of their duties growing out of their relation to the public. On the other hand, every principle of fairness and right demands that the carrier should be sustained in enforcing such reasonable regulations as may by experience be found necessary and proper in the conduct and management of the vast machinery to be administered in carrying on this complicated and responsible business."

Questions as to what is, or is not reasonable, are sometimes determinable by the Court and sometimes by the jury. In the principal case the Court held, as a matter of law, that it would be unreasonable to require a passenger to tender the exact fare and that the carrier must be prepared to furnish change to a reasonable amount, and further that five dollars was such a reasonable amount, so that the tender of a five dollar gold-piece, or note, was reasonable.

In the case referred to in the opinion of the Court (*Fulton v. Grand Trunk Ry. Co.* (1858), 17 U. C. Q. B. 428), it was also as a matter of law held, that the tender of a twenty-dollar gold piece in payment of fare amounting to one dollar and twenty-five cents "was not a reasonable offer to pay," requiring, as it did, more than eighteen dollars to be paid back in change. Even the officer attending at the ticket office "might reasonably object to the offer of a twenty-dollar gold piece in order that one dollar and thirty-five cents might be taken out of it. If any or all of the

passengers might put him to the trouble of giving back so much change as that it would be impossible that the business could be transacted with the expedition which is necessary, or with proper caution." Much less reasonable would it be to require the conductor to be prepared to make change to such an amount.

Thus, it appears that the question to be determined is recognized in both cases to be, what is reasonable under the circumstances. This is emphasized in the principal case by reference to the fact that this question might have to be answered differently in the case of steam railroads, where fares may be paid at the ticket office, and street railways, where they are payable only upon the cars. While in each of these cases the Court very properly treats the question of reasonableness as one of law, circumstances might be readily conceived which would render the reasonableness of the amount tendered a question of fact, to be submitted to the jury.

In a number of cases the duty of a street railway to deal with its passengers in a reasonable manner, has been recognized and enforced by the courts. In *Hall v. Second and Third Sts. P. Ry. Co.* (1883), 14 W. N. C. (Pa.) 242, where a passenger, in handing his fare to the conductor, dropped the coin into the straw upon the floor of the car, the Court held that he was entitled to remain upon the car for a reasonable length of time to search for the coin, before he could be ejected for non-payment of fare. In *Corbett v. Twenty-third St. Ry. Co.* (1886), 42 Hun. (N. Y.) 587, the facts were as follows: The passenger, on entering a car which was operated by a driver without a conductor, put into the box used for that purpose five fares for himself and three companions. Upon discovering his mistake and applying to the driver for the restitution of the excessive fare

placed in the box, the driver refused to restore it, alleging that he had no authority to return the fare or correct the mistake, and directed the passenger to repair to the office of the company for his money. During a wordy altercation between the passenger and the driver, which followed the latter's refusal to return the fare, a lady entered the car and delivered her five cents fare to the passenger who placed it in his pocket, and, upon his refusal to deposit it in the box, the driver ejected him from the car and delivered him into the custody of a policeman. A regulation of the company required a passenger thus deprived of his money by his own mistake, to go to the office of the company for reimbursement. The Court held that "the plaintiff was clearly entitled to a restitution of the money deposited by him by mistake in the box placed in the car to receive the fare of the passengers, and, as the driver himself was not authorized to return the fare, and in that manner correct the mistake, it was an entirely reasonable course to adopt for the plaintiff to receive the fare, which he did of the other passenger, and in that manner reimburse himself for the money inadvertently placed in the box. The regulation of the railway company requiring a passenger, who may be deprived of his money by his own mistake in this manner, to go to the office of the company for its reimbursement and the correction of the mistake, is entirely unreasonable. * * * As long as the company does not authorize the driver himself to rectify the mistake, it is no more than reasonable that the passenger should be at liberty to do so by receiving, for that purpose, the fare of any passenger afterwards entering the car."

In the case of *Morris v. Atlantic Ave. R. R. Co.* (1889), 116 N. Y. 552, a rule of the company imposing an extra charge for packages brought upon its

cars and "too large to be carried on the lap of the passenger without incommoding others," was considered. The Court say: "For the successful operation of the road, and for the accommodation and comfort of its passengers, certain regulations are evidently essential. The one in question was reasonable, but that portion of it relating to the present case is indefinite in so far that it does not in terms furnish all the information necessary to its execution, which is dependent upon the fact that the package is too large to be carried in the lap of the passenger without incommoding others. A package may be such and so large as to require the conclusion that it is within the rule, which entitles the company to demand the increased fare, and in such case the Court might, as matter of law, so determine. When it does not necessarily so appear, the question arising, in that respect, becomes one of fact to be otherwise disposed of. In the present case * * * the question was for the jury to determine whether the extent of the plaintiff's package was such as to be embraced within the meaning of the regulation."

It has been frequently decided that the conductor of a street car has the power to expel a passenger whose condition and conduct, either by reason of intoxication or other cause, are "such as to give a reasonable ground of belief that his presence and continuance in the vehicle would create inconvenience and disturbance and cause discomfort and annoyance to other passengers:" *Vinton v. Middlesex R. R. Co.* (1865), 11 Allen (Mass.) 304; *Murphy v. Union Ry. Co.* (1875), 118 Mass. 228; *Lemont v. Washington & G. R. R. Co.* (1881), 1 Mack. (D. C.) 180. In the last mentioned case the Court held that a passenger in a street railway car, who is unable to sit up and is sick to vomiting, may lawfully be expelled, whether his sickness proceed from drunkenness or

not. "Where the circumstances are of such a striking character as to give rise to a reasonable and honest apprehension of disorder and annoyances from his conduct and condition of a passenger, the conductor may exercise his authority and exclude the offender, in order to maintain the peace and order of the vehicle intact. It is evident that the police of horse railway cars, in order to be efficient, must be preventive as well as retroactive, and this can only be done by allowing the conductor to exercise a reasonable discretion in order to prevent acts of impropriety or violence, when they are likely to occur. A homicidal lunatic, or a notorious thief, may be ejected, although they have neither slain nor robbed a passenger, if there is reasonable fear of danger. * * *

The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised, except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers, if admitted into a public vehicle or allowed to remain. * * *

Thus we see that reasonable and probable cause will authorize the carrier or his agents in the business to exercise the right of exclusion in a proper case, where a breach of good order might reasonably be apprehended. * * * Of course, for an abuse of this discretion or for any oppression in its exercise, the company would be responsible."

In *Conolly v. Crescent City R. R. Co.* (1888), 41 La. An. 57; s. c. 28 AMER. LAW REG. 255, the passenger entered the car perfectly sober and well-behaved. While on the car, he was stricken with apoplexy, accompanied with severe vomiting, which occasioned serious discomfort and inconvenience to other passengers. He attempted to leave the

car, but fell upon the floor, where he remained helpless, speechless, and incapable of taking any care of himself. The driver, assisted by a passenger, then removed him from the car and laid him in the street between the car-track and gutter. It was a bleak, drizzling December day, but the driver took no steps to secure the sick man any relief or assistance. He simply left him there, and went his way. The passenger remained exposed to the weather for more than four hours, when the police authorities removed him to the City Hospital, where he died the following morning. In affirming a judgment for damages against the railway company, the Court said: "When the condition of a sick passenger is such that his continued carriage is inconsistent with the safety, or even the reasonable comfort, of his fellow-passengers, regard for the rights of the latter will authorize the carrier to exclude him from the conveyance. Thus if he had cholera, or small-pox, or delirium tremens, or even if, as in this case, he were subject, from any cause, to continuous vomiting, utterly inconsistent with the comfort of other passengers in a street car, the right of the carrier in protection of the latter's privileges to exclude him, would undoubtedly arise. Such is the reasonable doctrine of the cases cited. * * * But none of these cases hold that this right of exclusion may be exercised arbitrarily and inhumanely, or without due care and provision for the safety and well-being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized."

The same rule of care must be observed in the ejection of a passenger who is intoxicated: *Converse v. Washington & G. R. R. Co.* (1876), 2 Mac Ar. (D. C.) 504; or where the person is ejected for non-payment of fare: *Healey v. City P. R. R. Co.* (1875), 28

Ohio St. 23. In *Murphy v. Union Ry. Co.* (1875), 118 Mass. 228, the Court held that "it could not be said as matter of law that it would be a wrongful act to attempt to eject a person, who might otherwise be lawfully ejected, merely because the car was in motion. Whether it would be so or not, would be a question of fact, to be determined by the jury in view of the rate of speed at which the car was moving, as well as the other circumstances."

As already stated, questions as to what is or what is not reasonable in the rules or conduct of carriers of passengers, are sometimes determinable by the Court and sometimes by the jury. But the cases on this branch of the subject are not uniform and it is not possible to lay down an absolute rule. In *Day v. Owen* (1858), 5 Mich. 520, a case frequently cited and followed, the Court say: "The reasonableness of a rule or regulation is a mixed question of law and fact, to be found by the jury on the trial, under the instructions of the Court. It may depend on a great variety of circumstances, and may not improperly be said to be in itself a fact to be deduced from other facts. It is not to be inferred from the rule or regulation itself, but must be shown positively." The question in that case was as to the reasonableness of a rule of a steamboat line, excluding colored persons from the cabins of its boats.

The other extreme is found in the views of the Court in *South Florida R. Co. v. Rhoads*, S. Ct. Fla., Jan 18, 1889, where it is said: "The reasonableness of rules prescribed by railroad companies, and like corporations with like powers, is a question of law to be decided by the courts, and not a question of fact to be decided by juries." The rule there sought to be enforced was a peculiar one, forbidding the

employees of a competing line of steamboats from wearing their uniform caps or badges upon the cars of the railroad company. The Court held such rule unreasonable, saying that "railroad companies have no right to prescribe the dress of any passenger."

In each of these cases, the rule is unquestionably stated too broadly. There can be no doubt that, in the majority of instances, the Court must pass upon the reasonableness of the rule or regulation in dispute. But this is not invariably the case. Circumstances may be shown which render it eminently proper that the question of reasonableness should be submitted to the jury. It may, moreover, be reasonable to enforce a rule at one time, and unreasonable at another. The manner in which the rule is applied, may also affect the question of reasonableness. And in the large number of controversies involving the conduct of a carrier's servants in their treatment of passengers, the aid of a jury must often be invoked, for the purpose of determining whether certain actions are, or are not, reasonable under the circumstances shown. How far the Court should go in particular cases in passing upon questions of reasonableness as matter of law, must be determined by the application of those general principles which mark out the dividing line between the respective provinces of the two great co-administrators of the law.

This annotation has been confined, so far as possible, to the narrow questions suggested by the principal case, in their relation to street railways only. A full discussion of the general subject of the right to eject for non-payment of fare will be found in the annotation to the case of *Butler v. Manchester S. & L. Ry. Co.* (1888), 28 AMER. LAW REG. 81.

JAMES C. SELLERS.

ABSTRACTS OF RECENT DECISIONS.

AGENCY.

Advances made by agent, for the purpose of aiding his principal in effecting a combination to raise the price of wheat by buying all the wheat in the market, and then making contracts for the purchase of wheat for future delivery, cannot be recovered by the former; such combination is unlawful at common law. *Samuel v. Oliver*, S. Ct. Ill., Oct. 31, 1889.

Real estate agent is entitled to his commission, if a sale is effected through his agency as its procuring cause, although the sale may be actually made by the owners of the property, if by the agent's exertions the purchaser and owner are brought together, and the sale results therefrom; it makes no difference that the owner sold for a sum less than the price at which the agent was authorized to sell. *Plant v. Thompson*, S. Ct. Kan., Dec. 7, 1889.

ANIMALS.

Owner of dog, when he looses it for his own advantage, must see that it does not injure innocent passers on the public street, and to that end is held to the greatest possible care, and must repair any damage that is caused by his neglect to properly restrain his dog. *McGuire v. Ringrose*, S. Ct. La., Dec. 2, 1889.

ATTORNEY-AT-LAW.

Act committed by an attorney, whether in the discharge of the duties of his office or not, which shows such a want of professional or personal honesty, as renders him unworthy of public confidence, makes it not only the province, but the duty, of the court, upon a proper representation of the case, to strike the name of the offender from its roll, but the bad character which will justify this action, must be such as to indicate that the attorney is an unsafe and unfit person to be intrusted with the powers of his profession. *State v. McClaugherty*, S. Ct. App. W. Va., Nov. 21, 1889.

BANKS AND BANKING.

Bank president is not such a trustee of the bank's funds as to give a court of equity jurisdiction of a suit against him for the alleged misappropriation of such funds. *Mullin's Appeal*, S. Ct. Pa., Jan. 6, 1890.

"*Banker*," as used in the United States statute, which imposes a tax "on the capital employed by any person in the business of banking," includes one whose business is buying and selling stocks for his customers, and who employs capital in his business and has a regular place for transacting it. *Richmond v. Blake*, S. Ct. U. S., Jan. 6, 1890.

BILLS AND NOTES.

Blank for name of payee in a promissory note authorizes any bona fide holder to fill in his own name within a reasonable time after coming into possession of the note, but he must make himself a party to such note by writing his name in the blank, before he can

recover upon it from the maker. *Thompson v. Rathbun*, S. Ct. Or., Dec. 3, 1889.

Indorser, who voluntarily pays a note from which he has been discharged by the negligence of the bank which held it for collection, in not making presentment for payment until a month after its maturity, during which time the makers had become insolvent, cannot recover back from the bank the amount paid. *Oil-Well Supply Co., Ltd. v. Exchange Nat. Bank*, S. Ct. Pa., Jan. 6, 1890.

Note made in one State, and payable in another, receives its legal character and effect from the laws of the latter State. *Stevens v. Gregg*, Ct. App. Ky., Jan. 23, 1890.

Payment of note, by its terms made payable at the convenience of the maker, of which he is to be the sole judge, must be made within a reasonable time; the language used does not contemplate that the money shall be due only at the pleasure of the maker, without regard to lapse of time or the rights of the payee. *Smithers v. Junker*, U. S. C. Ct., N. D. Ill., Dec., 1889.

Request by indorser that the holder of a promissory note will extend it for another year, made before the maturity of the note and coupled with an agreement to let his name remain upon it, constitutes a waiver of demand and notice on the part of the holder. *Cady v. Bradshaw*, Ct. App. N. Y., 2d Div., Oct. 8, 1889.

COMMON CARRIERS.

Agreement between rival steamboat owners to cease competition and share their net profits in a certain specified proportion, or, if either should sell his boat with a view to going out of the business, to give notice thereof to the other and not come back into the business either directly or indirectly, within one year after such sale, is void, as against public policy, and will not be enforced. *Anderson v. Jett*, Ct. App. Ky., Dec. 12, 1889.

Destruction by mob of rioters of goods in the custody of an interstate carrier, renders such carrier liable to the consignor, in the absence of any contract limiting the liability. *Gulf C. & S. F. Ry. Co. v. Levi*, S. Ct. Tex., Dec. 17, 1889.

Release by shipper of a common carrier from all liability on account of loss or damage to goods in course of transportation, is void, as against public policy, and recovery may be had for the full value of the goods lost. *Woodburn v. Cincinnati, N. O. & T. P. Ry. Co.*, U. S. C. Ct., E. D. Tenn., Dec. 20, 1889.

CONSTITUTIONAL LAW.

Telegraph companies, which have accepted the provisions of the United State statutes in regard to the use of the public domain, cannot be taxed by a State on messages, and the receipts therefrom, between points within and points without the State, as this is interstate commerce, but they may be so taxed on messages carried wholly within the State. *Western Union Tel. Co. v. Seay*, S. Ct. U. S., Dec. 16, 1889.

CONTRACTS.

Agreement with the United States Government to furnish it with a number of articles at stipulated prices, among which are shucks at sixty cents per pound is not enforceable as to that article, where the evidence shows that shucks were worth from twelve to thirty-five dollars per ton, that it was the custom to buy them by the hundred weight, and that the error occurred by failing to strike out the word "pounds" in the printed form on which the proposal was made, and insert "hundred weight" instead, and the contractor can only recover the market value. *Hume v. U. S.*, S. Ct. U. S., Dec. 16, 1889.

CORPORATIONS.

After expiration of charter, while a corporation exists solely for the purpose of winding up its affairs, a majority in interest of its stockholders cannot sell its property to a new corporation, of which also they are directors and stockholders, at a valuation estimated by themselves, against the will of the minority, and compel the dissenting stockholders either to receive shares of stock in the new corporation in return for their old shares, or to be paid therefor on a basis of the estimated valuation of the property, but the minority may require that the property be publicly sold. *Mason v. Pwabic Mining Co.*, S. Ct. U. S., Jan. 13, 1890.

Forfeiture of franchises of a corporation, by reason of a breach of the condition on which it was created, can be taken advantage of only by the sovereign power which created the corporation. *Elizabethtown Gas-Light Co. v. Green*, Ct. Ch. N. J., Dec. 10, 1889.

Savings bank managers are bound to such circumspection of the actions of officers and committees appointed by them as a reasonably prudent man would exercise in his own business, and are personally liable for losses occasioned by the omission of such circumspection. *Williams v. McKay*, Ct. Ch. N. J., Dec. 12, 1889.

CRIMINAL LAW.

Pardon of convict upon conditions which are afterwards broken, will authorize his being remanded to the penitentiary to serve out the balance of his sentence, although the time for which he was originally sentenced has expired. *State v. Barnes*, S. Ct. S. C., Jan. 7, 1890.

DEBTOR AND CREDITOR.

Payment by check of a pre-existing indebtedness is conditional merely and defeasible on the dishonor of the check; and when the check is drawn by a third party, the burden is upon the debtor to show that it was given and accepted as absolute payment. *Holmes v. Briggs*, S. Ct. Pa., Jan. 6, 1890.

DEEDS.

Insanity of the original grantor does not affect the title of a purchaser for value of real estate, who buys from the grantee of the lunatic, without notice, and the heirs of the latter cannot take

advantage of his incapacity at the time of the first conveyance. *Odum v. Riddick*, S. Ct. N. C., Jan. 14, 1890.

EVIDENCE.

Communications to law student, employed by a party to litigation to advise and assist in the suit, are not privileged. *Dierstein v. Schubkagel*, S. Ct. Pa., Jan. 6, 1890.

FIRE INSURANCE.

Husband has no insurable interest in his wife's separate property, under the laws of Indiana. *Traders' Ins. Co. v. Newman*, S. Ct. Ind., Oct. 31, 1889.

Joint policy to husband and wife on property of the husband provided that any change in the title, unless with the consent of the company at the home office, should vitiate the policy; a transfer from the husband to the wife through a third person of the property insured, rendered the policy void, and evidence was not admissible, in an action on the policy, to show that, when it was issued, the local agent who solicited the insurance, was informed of the proposed transfer and orally agreed that it should be made. *Walton v. Agricultural Ins. Co.*, Ct. App. N. Y., 2d Div., Oct. 22, 1889.

INNKEEPERS.

Baggage of guest was lost under the following circumstances: at the depot he was directed to an omnibus which was to carry him to a certain hotel, by a porter who cried out the name of the hotel and wore it on his cap, and he thereupon delivered the check for his baggage to the porter, telling him that he was anxious to have it promptly, to which the latter replied that it would come right along in another wagon; the porter then gave the check to another man, whom the guest did not know was not an attaché of the hotel; he recognized the porter, however, as the same one who on a former occasion had performed similar services for him, but he was not aware that the wagon which brought the baggage, was run by another person than the hotel proprietor; the omnibus and the wagon were the usual mode of conveyance from the depot to the hotel by agreement between their owner and the hotel proprietor, and the former bore the name of the hotel; the baggage was lost after its delivery by the railroad company to the person who presented the check. The proprietor of the hotel was liable for the loss of the baggage and was not relieved of such liability by the fact that the porter was not authorized to receive baggage or checks therefor from guests at the depot, but merely to advertise and solicit custom for the hotel. *Coskery v. Nagle*, S. Ct. Ga., Nov. 18, 1889.

JURISDICTION.

Alien, only temporarily within the district, cannot be sued in the Federal Court by citizens of the district. *Meyer v. Herrera*, U. S. C. Ct., W. D. Tex., Dec. 31, 1889.

Lery upon property to satisfy a judgment in a Federal Court brings it within the jurisdiction of such Court, and the subsequent death of the debtor does not confer upon the State Court probate

jurisdiction to administer on such property as part of the decedent's estate. *Rio Grande R. R. Co. v. Vinet*, S. Ct. U. S., Dec. 9, 1889.

National bank may be sued, or bring suit, in the Federal Courts by or against a citizen of another State from that in which the bank is located, where the amount involved reaches the statutory limit. *First Nat. Bank v. Forest*, U. S. C. Ct., N. D. Iowa, Dec. 26, 1889.

LIBEL.

Publication by mercantile agency, organized for the purpose of ascertaining and reporting the financial standing and ability of merchants, traders and other business men, in reports issued and sent to the agency's subscribers, that a judgment had been obtained against a merchant, is not libelous *per se*. *Woodruff v. Bradstreet Co.*, Ct. App. N. Y., 2d Div., Oct. 8, 1889.

LIMITATION.

Demand note is subject to the running of the statute from its date, although no actual demand has been made. *O'Neil v. Magner*, S. Ct. Cal., Dec. 5, 1889; *Jones v. Nicholl*, S. Ct. Cal., Dec. 12, 1889.

LIQUOR LAWS.

Druggist, when authorized by law to sell intoxicating liquors upon a proper application, has a discretion to refuse to sell under such authority and is not liable in an action of damages for such refusal. *Treahey v. Holliday*, S. Ct. Kan., Jan. 11, 1890.

License to sell liquors in a city for a year, on the payment of a certain sum, is not a contract, but a police regulation, and before the end of the year the city may by ordinance raise the fee for the unexpired term. *Moore v. City of Indianapolis*, S. Ct. Ind., Oct. 30, 1889.

MASTER AND SERVANT.

In a dangerous business, such as the generation and distribution of electricity, the employer is bound to know the character and extent of the danger, and to warn his servant specially and unequivocally, so as to be clearly understood; the servant is not required to know latent, but only patent, defects, and has a right to assume superior knowledge in his employer, and to rely upon the latter's prudence and judgment. *Myhan v. Louisiana Electric Light and Power Co.*, S. Ct. La., Dec. 2, 1889.

MUNICIPAL CORPORATIONS.

Interest on bonds of a municipal corporation ceases when the bonds fall due and the means are provided for their payment; the corporation is not bound, like an individual debtor, to seek out the holders of its obligations and tender them the amounts due, in order to stop the running of interest. *Friend v. City of Pittsburgh*, S. Ct. Pa., Jan. 6, 1890.

RAILROADS.

Bridge watchman is not a fellow-servant with the engineer and

conductor of a train, so as to exempt the railroad company from liability to the former for injuries sustained through the negligence of the latter. *Pike v. Chicago & A. R. R. Co.*, U. S. C. Ct., E. D. Mo., Jan. 15, 1890.

Failure to give signal on approaching a private farm crossing, is not negligence, though the train, which was running at the rate of fifteen miles an hour, was not on schedule time, and though the view of the track was obstructed by a bank within about thirty yards from the crossing. *Annapolis & B. S. L. R. R. Co. v. Pumphrey*, Ct. App. Md., Feb. 6, 1890.

Refusal to accept fare from a passenger, after a train has been stopped for the purpose of ejecting him for non-payment of the fare, may be made by a railroad company, and the passenger may be again put off if he return to the train after his first ejection. *Pickens v. Richmond & D. R. R. Co.*, S. Ct. N. C., Dec. 16, 1889.

Statute providing that the killing or injuring of cattle "by the engines or cars running upon any railroad shall be *prima facie* evidence of negligence on the part of the company," applies not only to cattle running at large, but where they are yoked to a cart, and in charge of a driver. *Randall v. Richmond & D. R. R. Co.*, S. Ct. N. C., Dec. 21, 1889.

REMOVAL OF CAUSES.

Creditor's bill, which seeks to set aside certain alleged fraudulent confessions of judgment and transfers of assets by a limited partnership, and to have the assets of the insolvent firm distributed among all the creditors ratably, as provided by statute, and which makes defendants all persons claiming an interest in the partnership property under the alleged fraudulent judgments and transfers, presents but a single controversy between the plaintiff and all the defendants, as they are all necessary parties, and where one or more of the latter are citizens of the same State with the plaintiff, the cause is not removable to the Federal Court on the ground of diverse citizenship. *Graves v. Corbin*, S. Ct. U. S., Jan. 6, 1890.

SALE.

No warranty will be implied that a specific article of a known and recognized kind and description, which is ordered from a manufacturer or dealer, shall answer the purpose for which it is intended to be used; it is sufficient that the article supplied conforms to the description, and is of good workmanship and materials. *Goulds v. Brophy*, S. Ct. Minn., Nov. 5, 1889.

Oleomargarine is sold within the meaning of a prohibitory statute, by serving it with a regular meal at a public restaurant, as a substitute for butter, although it was not eaten, but paid for as part of the meal and carried away by the customer. *Commonwealth v. Miller*, S. Ct. Pa., Jan. 6, 1890.

TAXATION.

Debts due to a foreign corporation cannot be taxed in the State where the debtors reside. *Barber Asphalt Pav. Co. v. City of New Orleans*, S. Ct. La., Dec. 2, 1889.

TELEGRAPHS.

Delay in transmission and delivery of a telegraphic message, calling the person to whom it is addressed to a dying relative, is not excused by the fact that the telegraph company, at the time it contracted to deliver the message, was not informed by the contents, or otherwise, of the relationship of the parties. Western Union Tel. Co. v. Adams; Same v. Feegles, S. Ct. Tex., Dec. 20, 1889.

Railroad company may construct a telegraph or telephone line, over its right of way and for its own use and benefit in the operation of its road, without rendering itself liable to the land owners for additional compensation, but where such line is not constructed for this purpose, it will be considered a new easement, putting a new burden on the land, for which the land-owner will be entitled to additional compensation. American Telephone and Telegraph Co. v. Smith, Ct. App. Md., Dec. 17, 1889.

TRADE-MARKS.

Name of place, where goods are manufactured, may be used by the manufacturer as a trade-mark, in combination with other words, to distinguish the origin or ownership of the goods, and no other person will be permitted to use the name of the same place upon goods manufactured by him at another and a different place. El Modelo Cigar Mfg. Co. v. Gato, S. Ct. Fla., Jan. 7, 1890.

Right to trade-mark may be acquired by one in his own name, or the name of another, but not to the exclusion of the right of another person of the same name, and whose place of business is in the same place. Id.

WILLS.

Lead-pencil writing, signed by the writer's first name only and not in the form of a will, but reciting "a few little things I would love to have done," and addressed to no one by name, is properly admitted to probate as a will. Knox's Appeal, S. Ct. Pa., Jan. 6, 1890.

JAMES C. SELLERS.

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LIABILITY OF CHARITABLE ASSOCIATIONS FOR NEGLIGENCE OF THEIR SERVANTS, AND THE EFFECT OF THE MOTIVE OF A FOUNDER.

The commentary, or criticism, on the decision of the Supreme Court of Pennsylvania in *Boyd v. Insurance Patrol*, 28 AMERICAN LAW REGISTER 669, deserves notice, and opens interesting subjects. It consists of two parts. The first is addressed to the legal meaning of *charity*, that is, what constitutes a charity in the legal aspect, and it seems to be supposed that if the motive of the giver is selfish, the subject ceases to be a charity. The basis of this, the only pretence put forward, I believe, is a brilliant passage in Mr. Binney's argument in the Girard Will Case, assumed to be a legal definition, of mathematical accuracy, of charity.

It is a capital illustration of the pestilential habit of confounding reasons for a decision with the point decided. In place of reading the facts and the judgment and drawing conclusions, we read the essay justifying the conclusion, and call *that* the decision.

The fallacy ought to have been made patent by the inquiry, Did anyone ever set up, in avoidance of a gift by deed or will, that the motive of the donor was tainted, in those cases where the gift was certainly void if the object was not a charity? Did any Chancellor, or anyone else, ever direct an inquiry into that fact? Is not this the legal test of materiality?

Let us look however to illustrations: they are better adapted to this purpose than any verbal discussion, for this really seems to do nothing but mislead.

Take a fire engine for the use of a village. Does anyone doubt this is a charity? If authority can be wanted to support this assertion, we have it in the case of Sarah Zane's Will, [*Magill v. Brown* (1833.), Brightley's (Pa.) Rep. 346, in U. S. Circ. Ct., E. Dist. Pa.] the most remarkable decision ever made in Pennsylvania. Not because it decided this point of law, but because of the trouble taken to demonstrate that such a devise was valid, though there was no person appointed to carry it out and it was impossible to exist without such a person, which involves the very essence of the most important peculiarity of the law of charitable uses.

Suppose this engine company were founded and maintained by subscription of the villagers? Does it require reasoning to show that the object, or subject, that is, the engine and hose and the house to keep them in, is not changed in its legal character by proof of the sources from which the property came into being? It is difficult to believe that anyone can discern a distinction in respect of the qualities or incidents of property, between that which is bought by an executor in pursuance of a testamentary direction, and what is bought with gifts by living men. I mean the incidents of the property, after it is bought, paid for and vested in trustees. But, in *Boyd v. Patrol*, the Court below (the majority, I mean) evidently thought that the motive for the gift, changed the character of the property when it was bought. And if it could be shown that the motive of the contributors was self-protection, the property that was to be used for that purpose was not a charitable use. That is, a school, a church, a hospital, an almshouse, endowed and maintained by gifts or contributions, does not become a charity, if the motives of the givers were selfish or vicious; or ceases to be a charity when the motives of the founders can be ascertained to have been selfish.

Singular specimen of reasoning certainly, if the process can deserve that epithet. One would have supposed that the pertinent question that presented itself would be, If these are not charities, because of this vice in their origin, in whom is the

title vested? When I have ascertained there is a trustee, I must also find a *cestui que* trust, or what follows? Can there be a trustee and no *cestui que* trust, and if there is no charity, who is the beneficial owner of the hospital?

We have had recently in Philadelphia, a memorable instance of the misapprehension that exists on the subject of property dedicated to charitable uses. *Attorney General v. Pauline Home*, CP. No. 2, (December 2, 1889). A charity was founded to remove children from the evils of the almshouses. The legislature, by prohibiting the maintenance of children in almshouses, made the particular form of the charity useless. The corporation dissolved and the question was, what was to be done with the proceeds of the property, a lot of ground intended for an asylum? The donors were shocked to find they had nothing to do with this. They were not owners and had no rights, except to see that the property was properly applied.

It is surprising how incapable many not unintelligent persons are of comprehending, that, after donation perfected, they have no more right in the property than a seller after he has been paid; that their right is that of a founder, and that right is confined to the enforcement of the trust.

To the lawyer, this is the explanation of the somewhat startling proposition, that in charities there is no resulting trust or use. The donor does not create a base fee by the gift. The objects of charity cannot fail. The poor ye have always with you.

The whole mystery of this branch of the law, lies just here. It was the recognition, by courts of equity, of the capacity to give ownership to a class such as the poor, the blind, and the like, that constitutes the whole of that anomaly, the law of charitable uses, one of the most remarkable specimens of judicial legislation that we possess, if only we can read the statutes, which it is evidently very difficult to do, for they consist of the judgments of chancellors.

Recurring to the principal case; if the Court had looked at the judgment of their predecessor, Judge KING, in *Thomas v. Ellmaker* 1 Pars. Sel. Eq. Ca. (Pa.) 98, they would have seen that this definition was unknown to him. For no one could possibly be ignorant that the foundation there, came from subscriptions, and

no one can question that the necessity of a Fire Department to the safety of the contributors' property, was the motive for contributing.

It was a great compliment to Mr. Binney that a brilliant rhetorical sentence of his argument, was treated as a complete definition that excluded all other elements : but one cannot say as much for those who rested on such a foundation. It is the absence of selfishness, no doubt, that is necessary to a charity but only in this, that no particular person can have private property in the thing, or derive profit, otherwise than as one of the public, until selected as the beneficiary. For such an interest, when vested in third persons, is fatal to a charity, whether they be children, or strangers to the giver.

The selfish element is fatal, if connected with the enjoyment, for the property then becomes private property and ceases to be charitable. But in the creation of a charity, the motive of the founder has nothing to do with the question, any more than it has to do with the incidents of any other estate, after it is created.

What is more to the purpose would be to look to the point before the Court in the Girard Will Case, and note that the point of Mr. Binney's sentence was not in the case before the Court. Certain property had been devised to the City of Philadelphia in trust for certain purposes. Was the devise void? The only objection, bearing upon the present question, was, that being a charity it was void for want of a trustee, the corporation being incompetent to act. The quoted sentence, therefore, had nothing to do with the case. The real point, and it was the only one about which a difficulty existed, was, that it is quite immaterial whether there was a trustee or not, for equity would always supply that deficiency. The reason why the argument took such a wide scope, was, that two of the most eminent of the American Courts, misled by a *dictum* of Lord LOUGHBOROUGH, had fallen into the error of supposing that this jurisdiction to thus aid a trust, if it was a charitable one, depended on the statute of Elizabeth, and this statute was not in force in Pennsylvania. Judge STORY had committed himself to this view, by his note printed in Wheaton's Reports, and the Chief Justice had argued one of the cases I have mentioned. The point was, therefore, a most perilous one, requir-

ing two of the most influential members of the Court to acknowledge an error, though at the present time and with our lights, it is one most difficult to conceive to have been a possible one. They, however, did not hesitate to do so.

But as bearing on the present subject it will be observed, Mr. Girard's motives were not put in issue, so that the motives of the giver had nothing to do with the case; the plaintiff's case conceded the gift was a charity, it was the basis of their argument.

It is not a little surprising that so singular a view of the law of charity should have been entertained in Pennsylvania, when we have a very conspicuous illustration of the precise reverse, being the rule in the case of the *Philadelphia Library* [*Donoghue's Appeal* (1876), 86 Pa. 306], where the contributions are assessments on stockholders, who thereby pay for the use of the books. The test put there, by counsel, was: Could the stockholders elect to sell out and divide the accumulations intended for the public posterity? The converse is found in *Babb v. Reed* (1835), 5 Rawle (Pa.) 151—and the definition of SERGEANT, J., in that case, avoids everything like what Mr. Binney's definition assumed. No one will dispute its superiority, for accuracy. Its positive and negative are almost perfect. *Mutual benevolence* is not charity; and why? Its *mutuality* is fatal, but it is in the receiver and not in the giver.

But there is something deeper still that deserves notice; its consequences seem to have been overlooked. Charity has introduced a new law of property: it, and it only, can validate a gift when there is no person that has or ever can have any beneficial interest. The importance of this is obvious.

In fact, it is the purpose or object to which the property is to be applied that is the test. Gifts *for any legal public, or general purpose*, as Sir JOHN LEACH said, are charities, provided they do not come from a duty imposed on the donor. Hence taxes are not charitable funds, because compulsory, but money to be used as taxes, and in reduction of the burdens is a charity.

II. RESPONDEAT SUPERIOR.

The next branch of criticism deserves more consideration, and the subject is extremely important and interesting.

The apparent and possibly real differences of opinion in the men whose judgments are cited, certainly deserve attention. One, the Rhode Island Case [*Glavin v. R. I. Hospital*, 1879, 12 R. I. 411], goes to the length of the judgment of ALLISON, P. J. [in the court below in the Pennsylvania Case], which was reversed. Nothing approaching to this is to be found in the English Cases. The nearest thing to it is found in the dicta of Lord WESTBURY in *Mercy Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 126. Anything more misleading I cannot imagine, than putting, as he there did as an analogy, the liability of trust funds to be lost by the act of the trustee, and the liability of the trust funds for the act of the trustee. In the former, the loss only occurs *because the trust was not known*. Had there been notice of the trust, the loss could not have been incurred. How in the world does this tend to show liability of the trust funds as such for the act of the trustee? The inference is directly the other way. Certainly such a slip as this is very unusual over there. The fact that Lord WENSLEYDALE assented to the liability solely on the ground of precedent, and the candid statement of M. J. BRETT of the conflict of authorities or dicta deserving consideration, shows that the question is extremely difficult and delicate, but I doubt if it ever occurred to any English lawyer to extend the doctrine of *respondeat superior* as the Rhode Island Case, and the case in our Common Pleas did. They shock common sense.

It has considerable bearing on this question, which is, when does the doctrine apply, and above all when is it that trust property is legally made liable to pay the damages for the wrongful act of the trustee or his servant, when the property belongs neither to the wrongdoer nor his master, but to a class that have not done the wrong nor employed the person that did it? I say it has a bearing on this question if we start with the fact that *Respondeat Superior*, as we understand it, is probably a piece of local English law.

I do not propose to investigate this question and therefore will do no more than point to three things I have stumbled on that are sufficient to prove to any mind this to be the fact.

(1.) In Broom's Maxims, there is not under this head, an

allusion to the Roman law, or to the origin of the rule in that law.

(2.) In a note of Story on Agency (§458) there is extracted a bit of a learned essay, showing where and to what extent the maxim was introduced into the Roman law, and that it was confined to cases where the agent was performing the duty contractually assumed by the principal, and that the rule as we apply it was unknown to Roman lawyers.

(3.) No such law is known in Spain. *The Moxham* (1876), 1 Pro. Div. 110, and as that is a medieval country, probably there never has been an innovation in the law from the time of Julius Cæsar.

To hold one liable for the neglect or carelessness of another when I did not direct or intend the act, requires a considerable process of reasoning to justify in any case. But to make me liable because a man I have paid to do an act of kindness to an unfortunate, hurts somebody by his carelessness, at first blush seems monstrous, and I think must always seem so to minds not perverted by mere scraps of legal phraseology.

Let us look at some illustrations. If the good Samaritan, after binding up the wounds and pouring in the oil and the wine, and lodging the wounded wayfarer, had been sued by that ungrateful man, because the innkeeper's cook dropped some scalding water on him, we would have had the parallel to the application of *respondeat superior* by the Common Pleas, and for declining to accept this doctrine the Chief Justice is taken to task by the commentator. In fact, the Court of Common Pleas went much further; it held the Samaritan liable for the act of the innkeeper's cook, not only to the wayfarer, but to casual passers, if the cook was attending to the wants of the wayfarer, and therefore was in the employ of the Samaritan. No Courts have ever carried the doctrine further than those of England, but such nonsense as this, we may depend upon it, they were never guilty of. It is wise to consider common sense before we launch out into the realms of legal reasoning.

To hold me liable for the acts of a man I have hired to act as a nurse for a destitute sick person, to make me liable for the defect of a carriage I hire to carry a sick person home, or

to a hospital, or to give him an airing, is, I think, perfectly absurd. It really confounds the relation; the contract is between the nurse or the driver, and the sick person, not between me and him. That I pay for the service, has nothing to do with the subject. I am not the employer, but the paymaster, and if there is a relation of employer on my part, it is that of voluntary bailee, which requires something like fraud, that is, intentional wrong, to create a liability. For the employment is only in the selection of an agent. What possible distinction is there between such a person, and one who volunteers to pay the tolls, or the passage money for a poor person? Does he thereby become the carrier or owner of or liable for defects in the bridge?

In the English cases that raised a doubt, together with some reasoning given in other cases, the defendants were engaged in commercial enterprises where the plaintiff paid for the use of the works, and the defendants received the profits. It is very difficult for me at least to see why the fact that the funds were applicable to another purpose, had anything to do with the case, further than as an argument that as the parties acted under a statute, this diversion of the fund created an implication of exemption. If it had been the case of a trustee acting under a settlement, no one would have paused to enquire whether the trust property could be applied to recoup the damages incurred in executing his duties. The Court could not bring themselves to say, that in such things the employer is not liable, and they held that the corporation and not its officers are the proper persons to look to: *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 E. and Ir. Appeal. pp. 107, 118, 124, 126.

In these cases, the profits were applicable to the reduction of the charges, and if we can rid ourselves of *forms*, we will see that the ultimate beneficiaries were a mere trading company for a profit, and the machinery of corporation, or trustees, was no more than a partnership for this purpose.

In the *Herriot School* (1846), 12 Cl. & F. 507, the notion of making the charity estate responsible for the wrongful act of a manager, would be merely ludicrous, were it not for the hardship on the manager that must result from exempting the

fund, where in all honesty and sincerity, he makes a mistake. But how is it with trustees generally? Did any one ever hear of their defending for a wrong on the ground that the trust estate and not they were liable, or asking to be recouped out of the trust estate for damages they had been compelled to pay for a breach of duty confessedly not in accordance with the trust?

But the particular point is, where the master is manager of a charity, does the person employed by him in that duty, occupy the relation of servant, so that the servant is not, and the master is liable for the carelessness of the servant? The remarks I have made as to the origin of this most artificial of rules, are here very pertinent.

If the natural rule is, as I have endeavored to show that it is, viz.: that no one is answerable for the conduct of another, unless he directed it, but each man is liable for his own sins and he only (we have the Hebrew prophet's authority for this rule, in the loftiest conception of moral responsibility), is it unreasonable to make the same exception in our artificial rule known as that of *respondeat superior*, when the master is a charity or the managers of a charity, and to hold that here the same rule shall apply as is applied, when the employer is a government or a servant of a government or of a municipality when acting for the government and not as a private person.

It should then be borne in mind, that the owners of a charity are the beneficiaries, the class intended to be benefited. The legal title is a corporation or in trustees, but the trust is known, and to charge the funds with a dereliction of the trustees is not less absurd than it would be to charge an infant's property with the misconduct of a trustee in the marriage settlement under which the infant claimed. The results such as those of the Rhode Island Case, are possible only where the corporation is supposed to be the equitable as well as legal owner of the property. Test that by a dissolution of the corporation and the rule for distributing the assets. This will show who is the legal owner of the property.

Now the first thing that may be observed, is the rule as to public servants. No one doubts, I suppose, the liability of a man for his own acts, and no one would demand that the

public should compensate for injuries inflicted by its servants. We are of course dealing with acts that were not commanded. The remarkable fact is that it was once attempted to make the intermediate agent liable, because his master, being the government, was not liable, at least it so strikes my mind. But I am probably wrong, for such a palpable objection, if it exists, would not have been overlooked by the men who had to deal with *Whitefield v. Despenser* (1778), 2 Cowp. 754.

Then we come to municipalities, and it cannot be disputed that there is a clear division between omissions of duties imposed on the municipality, and misconduct in performing duties imposed on the servant or person employed by the municipalities. Possibly the true distinction may be between those duties which are public duties, such as police and the like, and those that differ not from duties imposed on private persons, such as repair of roads: *Elliott v. The City* (1874), 75 Pa. 347, and *Freeman v. The City* (1879) [Common Pleas, No. 4, of Philadelphia], 7 W. N. C. (Pa.) 45 are illustrations, and in the latter this distinction is noticed. The famous case of *Whitefield v. Despenser* (1778), 2 Cowp. 754, shows that the distinction between public servants, such as the Post Master General, and the Trustees of a public work, such as Docks, where no one but those using them derive a profit, must rest on something like that I have alluded to, viz. the distinction between ordinary commercial operations, though without profit directly to the undertakers, and those performing a public duty.

All these show that the rule is artificial; it is a creature of the courts. No one would ever waste time to discuss the propriety of the rule in the ordinary run of human affairs. But if the Post Master is not liable for the negligence of his servants, why should a trustee for a charity which is a public duty, quite as much as that of the Post Master?

What are all these rules made for? The general good only. The contributors and managers of charities are always volunteers. Nothing of private profit enters into the arrangement. Natural justice demands no more than that the person causing the injury should answer. To load persons willing to serve the public with this responsibility, is certainly not for the public good. And if the employer is not liable for the

selection and conduct of his servants, it is really absurd to fasten the liability on property they are required to administer, where there is not an instance in which a trustee can lawfully bind his estate except by a power.

If we desire to bring distinctly to the mind the steps that are necessary to fasten upon charitable estates a liability for acts of servants under the rule of *respondet superior*, we must first define that rule, to ascertain what sort of *superior* it is that is liable and when and why.

It is either because the servant is *alter ego*, or because of the duty to select a proper person to be the servant. And we are met by the well-known exception that if the employer does not retain the power of directing the servant, the rule does not apply, as when we employ a builder to put up a house. That is, the relation of employer and builder does not admit the rule to be applied. This would at once dispose of the Rhode Island case.

The next step is, that the real owners are the beneficiaries, all others are trustees or agents, and the beneficiaries do not select the servant. They have no voice in the matter. How then do the parties administering the charity become entitled to charge the fund for damages caused by their own misconduct? For it is only with misconduct that we are dealing. We are not dealing with conduct that is in performance of the duty of administration.

It is quite clear, I suppose, that no one can charge the property of another without a power is conferred to do so. And it is equally clear that the beneficiaries, the equitable owners, do not give any such power and were not asked to do so.

It is also clear that while all trustees are entitled to be indemnified out of the trust estate, it is only for legitimate expenditure. I doubt if any one ever heard that a trustee was allowed credit for damages recovered for misconduct even when doing anything that was his duty to the estate to do, still less for damages incurred when doing what he ought not to do.

If the trustees of a charity differ in this respect from other trustees and are entitled to apply the funds in their own relief it must arise from an authority implied in the appointment or

the creation of the trust, that they may so apply the funds. There is nothing absurd in this, any more than in an agent stipulating for indemnity from a principal. But the action cannot lie against the principal, for you cannot sue the blind or the sick as a class, so the fund cannot be sued. A defendant must be a person, not a thing, except when the proceeding is *in rem*. Hence, the only possible claim against the fund, is by the wrongdoer for indemnity.

Is it then part of the implied terms of charitable uses that the administrators may be indemnified for their unlawful acts? Or, to go a step further, for the unlawful acts of their servants?

As far as I know, until the Rhode Island Case, it never entered into the mind of man to conceive such an anomaly in the law of trusts. And it seems to me impossible to assert as a rule of law that while that class of *cestui que* trusts and their property, under a marriage settlement, are not liable, though they are quite capable of self-protection, the *cestui que* trusts and their property who can have no status in court are liable for the unlawful acts of agents appointed to manage the property. This is what was decided in the Rhode Island Case, and by the Common Pleas of Philadelphia. The community is to be congratulated on the decision of our own Court on this question, as it has withdrawn one class of cases from the burden of a rule that might very well put an end to some of the best institutions we enjoy. Limit the liability for negligence to the person really in fault and charities are safe, a general law to that effect is not to be hoped for, for what would become of the bar if such a rule was adopted by the legislature, but surely we do not need to extend this rule to subject to liability property to which the wrongdoer cannot lawfully apply it.

RICHARD C. McMURTRIE.

NOTE.—The facts of the Patrol case were stated upon page 670 of THE AMERICAN LAW REGISTER for November, 1889 (Vol. 28, N. S.), and they finally developed, upon the second hearing in the Supreme Court of Pennsylvania (*Boyd v. Insurance Patrol*, 1889, 120 Pa. 624) the two interesting questions discussed by Mr. Gest and Mr. McMurtrie. In brief, an action was brought against the Fire Insurance Patrol of Philadelphia, to recover damages for the death of the plaintiff's husband, alleged to have been caused by the negligence of the defendant's servants while engaged in their chartered employment. On the trial, the plaintiffs offered the defendants' charter in evidence, which showed that the latter was

organized "to protect and save life and property, in or contiguous to burning buildings, and to remove and take charge of such property, or any part thereof, when necessary," that it was armed with the necessary police powers to carry out these objects, and that there was no provision for creating a capital stock, or for acquiring any emoluments, or declaring dividends. The Court, BIDDLE J., entered a non-suit, on the ground that the charter showed the defendant to be a public charitable corporation, and therefore not liable for the negligent acts of its servants, no negligence having been shown by the corporation in its selection of them. This ruling was reversed by the Supreme Court, on the ground that the charter was not sufficient evidence of the character of the defendant corporation, but that it must affirmatively show, to escape liability, that its practical working was strictly in accordance with the terms of the charter. On the second trial it was shown that the Patrol protected the property of insured and uninsured alike, without any discrimination; that it was supported solely by voluntary contributions donated by a number of fire insurance companies in Philadelphia, without regard to the amount of property saved to each company; that there was no capital, means of making profit, nor method for declaring dividends, and that its general effect was to greatly reduce the losses of personalty at fires, as well as to lower the rates of insurance. On these facts, the learned Court, ALISON J., held it was not a public charitable corporation, but a private business enterprise organized for gain, sufficient to prevent the body from being a charity, though outsiders shared in that gain, and that the motive of a donation is an element in determining whether the use is charitable or not. This was reversed by the Supreme Court, who held an indirect gain to the donors, in which all the public share, will not prevent a gift from constituting a charitable use; that no court has ever held that the donor's motive in a gift is a test as to whether it is a charitable use; that a charitable association cannot be held liable for the negligent acts of its employees, where no negligence is shown in their selection, that to hold the body thus liable, would be a diversion of the funds given for other purposes, and that the facts showed the defendant to come within the definition of a public charitable use.

A. B.

By the courtesy of the editor of THE AMERICAN LAW REGISTER, I have been permitted to read the above and to add a few words in explanation of some points in my previous article.

Mr. McMurtrie has apparently misunderstood the writer's observations upon the legal test of a charity. No one supposes, and certainly I never said, that "if the motive of the giver is selfish, the subject ceases to be a charity." On the contrary, it is expressly stated (28 AMER. LAW REGISTER p. 686) that Mr. Binney's definition, to which Mr. McMurtrie objects, may be rhetorical rather than exact; and it is expressly admitted that foundations established from selfish motives have been often recognized as charities. What was maintained is simply this, that no precedent can be found for a decision which holds an institution to be a charity which is "*founded and maintained for the express purpose of benefiting its contributors pecuniarily.*" This, the very point of my remarks, is not answered and no such precedent is cited.

Nobody doubts that a fire engine for the use of a village, is a charity, although the motive of the contributors was the safety of their own property. But the dis-

inction between that case and the Fire Patrol is simply this : in the latter there is the "element of gain" to which Mr. Justice Paxson refers in the *Women's Christian Association Case* (1889), 125 Pa. 579.

It is not intended to reply at length to what is said upon the second branch of the case, but merely to explain that the writer has in this also been misunderstood. Mr. McMurtrie argues as if it were asserted by me, that "The charity is liable for the tortious act of its servant, but the trustee is not." Nothing of the kind was said in my article. Lord CAMPBELL indeed, in the *Heriot's Hospital* case said, "The trustees would in that case (i. e., in the event of a recovery against the Hospital) be indemnified against their own misconduct," and I took pains to say that the truth of the matter was just the other way (28 AMER. LAW REGISTER p. 677). In ordinary cases, where a master is held liable for his servant's negligence, does any one suppose that the servant is "indemnified against his own misconduct" because, so far as the injured third party is concerned, recourse may be had, under the rule of *respondet superior*, against the master? The argument, if it be an argument at all bearing on the case, is directed against the rule itself and not against any exception to it in the case of a charity.

As to the rule itself, does it merit such wholesale condemnation? If so, it is strange that, so far as I know, it has not been abolished by statute in any of our States or in England. If charitable corporations are to be made an exception, on the ground of public policy, let the Court say so distinctly, and the argument turn on the question of expediency only. My purpose was to show that the exception does not rest on precedent or principle, that therefore the "higher ground" on which the case was rested, is insecure and the judgment (if it be right, as very possibly it is) should have been placed upon the ground alluded to by the Court, that the Patrol was a corporation created in aid of a municipality.

But it is said that the rule of *respondet superior* is probably a piece of local English law. Perhaps it is, but Judge HOLMES' account of its origin merits consideration. In his work upon "The Common Law," the rule is shown to have arisen from the Roman law, and what is equally to the point, its later development according to that author's opinion (foot note to p. 230) has been due to the same influence.

Granting however that Judge HOLMES is wrong in his view, one thing is certain, that for some hundreds of years the principle has been firmly established in the English law, and to say that it is merely local, is only to say what might be said of the Rule in Shelley's Case, or the whole system of real estate law. Certainly *respondet superior* is no more "artificial."

It is stated above (p. 211) to be clear "that no one can charge the property of another without a power is conferred to do so. And it is equally clear that the beneficiaries, the equitable owners, do not give any such power and were not asked to do so."

Now the first proposition is true as a general rule, but the rule is by no means of universal application. A familiar instance occurs in the rule that the chattels of a stranger found upon demised premises may be distrained for rent. Other cases may be recalled by the reader. And if it be so that the necessary power must be conferred by the beneficiaries, that is, the class to be benefited by the charities, I ask whence do the trustees derive their power to bind the funds of the charity by their contracts?

JOHN MARSHALL GEST.

RECENT AMERICAN DECISIONS.
SUPREME COURT OF MONTANA.

STATE OF MONTANA, EX REL THOMPSON v. KENNEY.

The Courts uniformly give credit to the result of an election which has been declared by a legally constituted canvassing board, until such result is set aside by a tribunal having jurisdiction to try and determine the right to the office in contest.

The Act of Congress, and the Constitution and Ordinances of the Constitutional Convention of Montana, declare exclusively who shall canvass the votes at the election for the approval of the Constitution and the choice of the first State officials.

An ordinance of a Constitutional Convention is a convenient method of separating temporary provisions from the body of the proposed Constitution; the force of such ordinance is the same as that of the proposed Constitution itself.

A member of the legislative assembly of Montana, whose compensation is fixed by law, is entitled to have the same audited and settled, upon proving his mileage and number of days of attendance; and the courts will enforce this right by *mandamus*.

This was a *mandamus* proceeding in this Court and the facts are fully stated in the opinion.

Elbert D. Weed, McCutcheon & McInture, and S. A. Balliet, for relator; Hon. *H. J. Haskell*, Attorney General, for the respondent.

HARWOOD, A. J., January 28, 1890. This action was commenced in this Court on the 17th day of January, A. D. 1890, by filing the relator's affidavit, upon which he prayed for the issuance of a writ of mandate directed to Edwin A. Kenney, auditor of the State of Montana, commanding him to forthwith audit and settle and issue relator a certificate for a certain alleged claim in favor of relator against the State of Montana in the sum of \$339 for mileage and per diem for attendance as a member of the House of Representatives of the legislative assembly of the State of Montana.

The affidavit of the relator recites the following facts:

That affiant, William Thompson, is over 25 years of age, now is and has been for more than twenty-five years last past a resident of the Territory and State of Montana, and for three years last past has been a resident of the County of Silver Bow, the said County being one of the representative districts of the State of Montana. That, at the election held in the Territory of Montana on the first Tuesday of October, A. D., 1889, under the provisions of an Act of Congress entitled "An Act to provide for the division of Dakota into two States, and to

enable the people of North Dakota and South Dakota, Montana and Washington to form State Constitutions and State Governments, and be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," approved February 22, 1889; and as further provided for by the Constitution, Ordinances and Schedule framed by the Constitutional Convention for the State of Montana, and adopted by the people thereof, the relator, William Thompson, was a candidate for election to the office of Representative in the Legislative Assembly of the State of Montana from said representative district, composed of the County of Silver Bow. That relator was voted for at said election, and was elected to the office of representative from said district. That the returns of said election were made by the various judges of election in said district to the clerk of said Silver Bow County, and that fifteen days thereafter the Chairman of the Board of County Commissioners of said Silver Bow County taking to his assistance two officers of said County, canvassed the returns of said election, and declared the result thereof so far as county officers were concerned, and that so far as the members of the Legislative Assembly were concerned, the returns of said election were made to the Secretary of the Territory of Montana. That thirty days after said election, all votes for the members of the Legislative Assembly were canvassed by the Governor, Chief Justice, and Secretary of the Territory of Montana, who then and there found, ascertained, declared, and certified that the affiant, William Thompson, was duly elected to the House of Representatives of the Legislative Assembly of Montana, as a member thereof, and that the said Governor and Secretary of the Territory of Montana, did deliver to affiant a certificate over their hands and seal of said Territory, certifying and declaring that at such election aforesaid affiant had been elected a member of the House of Representatives of the said Legislative Assembly.

That on the 23rd day of November, A. D., 1889, at 12 o'clock, noon, pursuant to the proclamation of the Governor of Montana, the Legislative Assembly of said State was convened and affiant appeared at the Capital of the State at that time, and in conjunction with twenty-nine other persons, who had, as aforesaid, been ascertained, declared and certified by the aforesaid canvassing board, composed of the Governor, Secretary and Chief Justice of the Territory of Montana, to have been elected from the various representative districts in said State, did meet as the House of Representatives of the State of Montana, at the Capital of said State, and in the place by them and the Auditor of said State agreed upon, of which place of meeting previous public notice had been given. That then and there, in a room provided for the purpose, the relator and said twenty-nine other persons convened and were called to order by the Auditor of the State of Montana, and thereupon the thirty members proceeded to qualify and organize the House of Representatives of the Legislative Assembly of the State of Montana, by the election of Aaron C. Witter, one of said members, as Speaker of the House of Representatives, and Benjamin Webster as Chief Clerk thereof. That such proceedings were then and there had by the members of the House, as that a committee thereof was appointed on credentials, to which committee the said thirty members presented severally a certificate signed by the Governor and Secretary of Montana, and over the seal of the Territory of Montana, certifying and declaring that each of them had been duly elected members of the House of Representatives of the Legislative Assembly of the State of Montana. That said committee on credentials then and there reported to the said House that the said thirty members aforesaid, including

affiant, were duly elected members of the House of Representatives of the Legislative Assembly of the State of Montana, and entitled to seats therein, which said report was approved and adopted by the said House.

That, thereafter, the said House continued to sit from day to day, from that date, to wit: November 23rd, A. D. 1889, to the date of the signing of affiant's affidavit, to wit: January 16th, A. D., 1890, and that affiant has attended said sessions, from that time until the time of making this affidavit, as a member of said House of Representatives, except on the 13th day of January, A. D., 1890.

That affiant travelled the distance of seventy-five miles in going by the nearest usually travelled route, from his residence to the capital of said State to attend said Legislative Assembly. That, on the 23rd day of November, A. D., 1889, the affiant and all the said twenty-nine members, took the oath prescribed by the Constitution of the State of Montana as members of the Legislative Assembly of the State of Montana, and that the said thirty members have attended upon the various sessions of the said House.

That on the 16th day of January, A. D., 1890, affiant presented to Edwin A. Kenney, who was then the Auditor of the State of Montana, at his office, an account against the State for his services and attendance as a member of the House aforesaid, at the rate of \$6 per day, and mileage at the rate of 20 cents per mile for the distance travelled as afore-said, as provided by law, and requested the said Auditor to audit and settle the said claim and give affiant a certificate thereof; but to audit and settle said claim or give affiant a certificate thereof, or any part thereof, the said Auditor did then and there refuse, nor would the said Auditor approve such claim, or any part thereof.

To which affidavit affiant attaches an account as "Exhibit A," which he verifies as a copy of the said account presented to said Auditor and referred to in his affidavit.

Upon this showing, an alternative writ of mandate was issued out of this court requiring the said Edwin A. Kenney, Auditor of the State of Montana, to forthwith audit and settle said claim against the Treasury of the State of Montana, and give to said William Thompson a certificate thereof, or to show cause before this court at 10 o'clock a. m., January 20th, A. D., 1890, why he had not done so.

To this process the respondent made his verified answer, wherein he expressly admitted in detail all the affirmative allegations set forth in the relator's affidavit. But in addition to such express admissions, the respondent alleged other matters, as follows:

"Defendant further says, that in the County of Silver Bow, which is a Representative District, ten persons were apportioned to be elected members of the House of Representatives. That as to the election of five of said persons, no controversy has arisen, but as to the said relator and four of his colleagues, sitting

with him in the House aforesaid, a controversy as to their election has arisen, and unless they are *prima facie* members of such House and entitled to act therein, no quorum has been present in said House, and the organization thereof has been without legislative authority. That the House is composed of thirty members, whose muniment of title is the ascertainment, declaration and certificate of the Canvassing Board, consisting of the Governor, Chief Justice and Secretary of the Territory of Montana, as provided in ordinance number two, passed by the Constitutional Convention of the State of Montana. That on the 23rd day of November, A. D., 1889, twenty-four persons from various representative districts in the State of Montana, who had been ascertained and declared to have been elected members of said House of Representatives, by the Governor, Chief Justice and Secretary aforesaid, under said Ordinance of the Constitution, did meet at another place in the capital of said State, and five members from the County of Silver Bow, one of whom assumed to have been elected in lieu of relator, met with said members last aforesaid, and having been declared not elected by the said Canvassing Board, provided for in said ordinance, did, nevertheless, assume to be members of the House of Representatives, and did then and there present as their muniment of title to said office, each a certificate signed by the County Clerk and Recorder of Silver Bow County, over his seal, certifying and declaring that such person was elected one of the Representatives of the district of Silver Bow County, as Representative in said House."

To the foregoing new matter set forth by respondent, the relator filed his replication, as follows :

First. The relator "denies that any controversy has arisen as to his election, and the election of four of his colleagues from the County of Silver Bow, as set forth in said answer.

Second. Avers that at the times the said House was organized, and when said House passed upon the report of the Committee on Credentials, as set forth in relator's application, a quorum of said House was present and acted therein."

The parties rested their case upon the allegations, admissions and denials in the pleadings above set forth, and upon the questions raised therein, the case was argued and submitted to the court for decision.

At the commencement of the consideration of the questions involved herein it is proper to notice the scope and effect of the relator's replication. He denies therein "that any controversy has arisen as to his election, and the election of four of his colleagues;" but he does not deny the further facts set out in respondent's answer. These specific facts alleged, stand unchallenged, and were urged upon the consideration of the court as ground for the refusal, on the part of the respondent, to audit and settle relator's claim, and to grant him a certificate thereof, as provided by law.

The relator relied upon the facts alleged in his affidavit, expressly admitted by respondent's answer, as grounds for the relief which he prayed for.

The effect of these pleadings raised questions of law only. No issues of fact were made upon which evidence could properly be introduced. The denial made by the relator's replication was nothing more than a denial of an immaterial allegation.

Compiled Statutes of Montana, Section 575 of the code of civil procedure, relating to the cases of mandamus, provides as follows :

" If no answer be made, the case must be heard on the papers of the applicant. If the answer raise only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing the argument of the case."

This court is given original jurisdiction to hear and determine actions of this character by section 3, article 8, of the constitution of Montana, as follows :

" The appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law. Said Court shall have power, in its discretion, to issue and bear and determine writs of habeas corpus, mandamus, quo-warranto, certiorari, prohibition and injunction, and such other original and remedial writs as may be necessary and proper to the complete exercise of its appellate jurisdiction."

In reference to the office of the writ of mandamus, the Compiled Statutes of Montana, sections 566 and 567, of Code of Civil Procedure provide as follows :

Sec. 566. It may be issued by any court in this State, except justice's, probate and mayor's court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Sec. 567. The writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued, upon affidavit, on the application of the party beneficially interested.

It must now be determined whether, or not, the act, the performance of which is here sought to be compelled, is one which the law especially enjoins upon the respondent as a

duty resulting from his office as Auditor of this State. This involves two propositions :

First. Is the relator entitled, upon the facts shown, to have his claim audited and settled, and to receive a certificate thereof?

Second. Does the law enjoin upon the state auditor the duty of auditing and settling said claim, and issuing to relator a certificate thereof?

These propositions will be considered in the order stated.

To the high office of legislator, and to persons occupying that office, the law guarantees certain rights, privileges and emoluments, which courts of justice will regard and enforce in proper cases and upon proper showing : Constitution of Montana, Art. 5, Sections 5, 15 ; 1 Blackstone, 164 and notes and cases cited ; Cushing Leg. Assemblies, Sections 546 to 957 ; Cooley's Cont. Lim., 162, 163 ; Jefferson's Manual ; 1 Kent's Com. 235.

But in passing upon a question of this character, relating to a person claiming to be a member of the legislative Assembly of the State, this Court is mindful of the constitutional provision which places the power to try the ultimate right to the office, in another forum, *i. e.*, in the legislative house wherein the person claims a seat : Constitution of Montana, Art. 5, Sec. 9.

That body, and that alone, having the plenary jurisdiction to try the ultimate right to the office, it must be determined in the case at bar, on what character of *prima facie* evidence will courts of justice enforce collateral or incidental rights and privileges belonging to the members of the legislative Assembly. In other words, as applicable to this case at bar, what constitutes in the view of the courts of justice sufficient *prima facie* evidence of his membership in the House of Representatives of this State to entitle the relator to the relief which he asks, that is, to have his claim to the emoluments of the office of representative from Silver Bow County, audited, settled and certified.

Under our republican form of Government election to this office is made by the votes of the legally qualified electors of the district in the manner prescribed by law, and the result of

such election is ascertained in the manner prescribed by law through the returns and canvass of such votes by legally constituted canvassing boards.

The courts have uniformly given credit to the result of an election, as ascertained and declared or certified by the legally constituted canvassing board to whom the law has committed the duty of canvassing the returns of the election, and declaring the result until this evidence of the election has been overborne by the trial and determination of the ultimate right to such office by the tribunal having jurisdiction to try and determine the same: *Crowell v. Lambert* (1865), 10 Minn. 369; *State v. Churchill* (1870), 15 Id. 455; *State v. Sherwood* (1870), 15 Id. 221; *People v. Miller* (1867), 16 Mich. 56; *Swinborn v. Smith et al.* (1879), 15 W. Va. 483; *Hulsman v. Rems* (1861), 41 Penn. 396; *Kerr v. Tiege* (1864), 47 Id. 292; *Commonwealth v. Baxter* (1850), 35 Id. 263; *DeArmond v. The State ex rel. Cambell* (1872), 40 Ind. 469; *Hadley v. City of Albany* (1865), 33 N. Y. 603.

This is not only the rule governing the action of courts, but it is the practice adopted in the organization of legislative bodies and admitting members thereto, until the *prima facie* evidence contained in the certificate of election issued by the legally constituted canvassing board is set aside by the proper authority in the determination of a contested election: Cush. Law and Practice of Leg. Assemb., Sections 141, 142 and 229 to 241, inclusive. The authorities reviewed and cited by this eminent author amply show the practice on this question: McCray on Elections, Sections 270 to 285, inclusive, and cases cited; Jefferson's Manual (12th Ed.), 390.

In the case at bar, it is asserted, and not denied, that another person holds a certificate of election to the same office which the relator claims to be occupying, issued by the County Clerk of Silver Bow County. It therefore becomes necessary, in the determination of this case, to ascertain what board, or person, is by law authorized to canvass the returns of the election in question, and ascertain and certify the result, so as to entitle the person holding that muniment of title to the office, *prima facie*, to maintain his case in an action of this character. If the right of relator to the certificate of election which he

holds is challenged, let the question be raised and determined in the proper form; but if the legislative body of which the relator claims to be a member, vested as it is with the powers which the Constitution of this State has committed to it, and in view of the long line of precedents which have guided the actions of such bodies in like cases, does not determine a controversy as to the election of the relator, then in the nature of the case there exists no better evidence of his right to relief than the finding or certificate of the legally constituted canvassing board charged with the duty of ascertaining the result of the election in question. The title to an elective office, in a majority of cases, rests on this *prima facie* evidence, because in the great majority of cases there is no adjudication of the right to the office which inquires back of the returns of the proper canvassing board. It is proper to observe here that under well established rules of law, if it was shown that a contest of the election of the relator was pending in the House of which he claims to be a member, and to which he holds a certificate of election, then this Court would withhold judgment until the case was determined, but no such fact appears.

The relator's certificate of election emanates from a canvassing board composed of the Governor, Chief Justice and Secretary. The other certificate, which is set up in opposition to this, is held by another person, emanates from the County Clerk of Silver Bow County, accredited under the hand and official seal of that officer; and this is not denied by the relator.

In the absence of any mention of this latter certificate, the consideration of this case necessarily involves the question as to whether the relator's certificate of election issues from the legally constituted Canvassing Board, charged with the duty of ascertaining, from the returns, the election of members of the House of Representatives. The *prima facie* right to relief rests upon the credentials, with the facts of service.

The act of Congress above mentioned, enabling the people of Montana and other Territories to form and adopt constitutions and set up state governments, provides in Sec. 8, as follows :

“ At the elections provided for in this section, the qualified voters of said pro-

posed States shall vote directly for or against the proposed Constitution, and for or against any articles or propositions separately submitted. The returns of such election shall be made to the Secretary of each of the said Territories, who, with the Governor and Chief Justice thereof, or any two of them, shall canvass the same."

Section 9 of the same Act provides as follows—

"That until the next census, or until otherwise provided by law, said States shall be entitled to one Representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the Representatives to the Fifty-first Congress, together with the Governors and other State officers provided for in said Constitutions, may be elected on the same day of the election for the ratification or rejection of the Constitutions; and until said State officers are elected and qualified under the provisions of each Constitution, and the States respectively are admitted into the Union, the Territorial officers shall continue to discharge the duties of their respective offices in each of said Territories."

Section 24 of the same Act provides as follows—

"That the Constitutional Convention may, by ordinance, provide for the election of officers for full State Governments, including members of the Legislature and Representatives in the Fifty-first Congress; but said State Governments shall remain in abeyance until the State shall be admitted into the Union respectively, as provided in this Act. In case the Constitutions of any of said proposed States shall be rectified by the people, but not otherwise, the Legislature thereof may assemble, organize and elect two Senators of the United States; and the Governor and Secretary of State of such proposed States shall certify the election of the Senators and Representatives in the manner required by law, and when such State is admitted into the Union, the Senators and Representatives shall be enabled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the State Governments formed in pursuance of said Constitution, as provided by the Constitutional Convention, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this Act, or by the Constitutions of the States respectively."

Section 25 of the same Act provides as follows—

"That all Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the Legislatures of said Territories or by Congress, are hereby repealed."

Having reviewed these provisions of the enabling Act of Congress, we will proceed to the Constitution of Montana, and consider its provisions upon this subject.

"Schedule," section 1, provides as follows—

"The laws enacted by the Legislative Assembly of the Territory of Montana, and in force at the time the State shall be admitted into the Union, and not inconsistent with this Constitution, or the Constitution or Laws of the United States of America, shall be and remain in full force as the Laws of the State, until altered or repealed, or until they expire by their own limitations."

Section 17 of the schedule provides as follows—

"All Territorial, county and township officers now occupying their respective positions under the laws of the Territory of Montana, or of the United States of America, shall continue and remain in their respective official positions and perform the duties thereof as now provided by law, after the State is admitted into the Union, and shall be considered state officers until their successors in office shall be duly elected and qualified, as provided by ordinance, notwithstanding any inconsistent provisions in this Constitution, and shall be entitled to the same compensation for their services as is now established by law; provided that the compensation of Justices of the Supreme Court, Governor and Secretary of the Territory, shall be paid by the State of Montana."

Passing to ordinance number two, referred to in the last section, ordained and promulgated by the Constitutional Convention, with the Constitution of the State, and adopted by the people, we find provisions as follows—

"First. That an election shall be held throughout the Territory of Montana on the first Tuesday of October, A. D. 1889, for the ratification or rejection of the Constitution framed and adopted by this Convention."

"Fifth. The votes cast at said election for the adoption or rejection of said Constitution shall be canvassed by the Canvassing Boards of the respective Counties not later than fifteen days after said election, or sooner if the returns from all the precincts shall have been received, and in the manner prescribed by the laws of the Territory of Montana for canvassing the votes at the general elections in said Territory. And the returns on said election shall be made to the Secretary of the Territory, who, with the Governor and the Chief Justice of the Territory, or any two of them, shall constitute a Board of Canvassers, who shall meet at the office of the Secretary of the Territory on or before the thirtieth day after the election and canvass the votes so cast and declare the result."

"Sixth. That on the first Tuesday in October, A. D. 1889, there shall be elected by the qualified electors of Montana, a Governor, a Lieutenant-Governor, a Secretary of State, an Attorney General, a State Auditor, a Superintendent of Public Instruction, one Chief Justice and two Associate Justices of the Supreme Court, a Judge for each Judicial District established by this Constitution, a Clerk of the Supreme Court, and a Clerk of the District Court in and for each County of the State, and the members of the Legislative Assembly provided for in this Constitution. The terms of the officers so elected shall begin when the State shall be admitted into the Union, and shall end on the first Monday in January, A. D. 1893, except as otherwise provided."

"Seventh. There shall be elected at the same time, one Representative in the Fifty-first Congress of the United States."

"Eighth. The votes for the above officers shall be returned and canvassed as is provided by law, and returns shall be made to the Secretary of the Territory and canvassed in the same manner, and by the same Board, as is the vote upon the Constitution, except as to Clerk of the District Court."

It is clear that said Act of Congress, legislating for the people of the Territory of Montana, supplemented and carried out by the Constitution and Ordinances framed and promulgated by the Constitutional Convention, and ratified by the people of the Territory, covered the whole question as to what Board should canvass the votes cast at the late election, both for and against the Constitution, and for members of the Legislative Assembly, and State and District officers, and declare the result.

The fifth paragraph of Ordinance two, above quoted requires that the returns of said election for the adoption or rejection of the Constitution—

"Shall be made to the Secretary of the Territory, who, with the Governor and the Chief Justice of the Territory, or any two of them, shall constitute a Board of Canvasser, who shall meet at the office of the Secretary of the Territory on or before the thirtieth day after election, and canvass the votes so cast, and declare the result."

The eighth paragraph of the same Ordinance provides—

"That the votes for all the State officers, members of the Legislative Assembly and District Judges, shall be returned and canvassed in the same manner and by the same Board as is the vote upon the Constitution."

It is contended by the respondent, that a statute of the Territory of Montana, existing prior to the said Act of Congress, and prior to the adoption of the Constitution, provided, contrary to the Act of Congress and the Constitution and Ordinances above quoted, in that this statute provides that the canvass of the votes cast for members of the Legislative Assembly shall be made by the Boards of County Commissioners of the respective Counties in the Territory, and certificates of election shall be issued by the Clerk of the Board of County Commissioners: Compiled Statutes, section 1033, page 930.

This position is untenable. There are no statutes of the Territory of Montana brought over and adopted by the peo-

ple of this State, contrary or in conflict with the Constitution thereof, for this plain reason: It is provided by the Act of Congress above quoted, enabling the people of said Territory to form a Constitution and State Government, that—

“ All laws in force made by said territories at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this Act, or by the Constitutions of the States respectively.” S. 24, *supra*.

This provision was further amplified by Section 1 of “Schedule,” of the Constitution of Montana, *supra*. By these provisions the statute law of Montana Territory is remoulded at once to join in harmony with the State Constitution.

An example of this modification or remoulding of the statute law to harmonize with the Constitution, is found in reference to the constitution of the grand jury. The express letter of the statute in force at the time the State was admitted into the Union, provided that this body should consist of sixteen persons in number, of whom twelve could find a “true bill.” The State Constitution provides that the grand jury shall consist of seven persons, of whom five are competent to find an indictment. It has been abundantly provided, by the Act of Congress and the State Constitution, that the statute is in force as modified by the Constitution, and it cannot be maintained, either as a logical or reasonable conclusion that there is a conflict, where the latter, and paramount organic law, has expressly adopted the former statute law, as modified by the Constitution: *State v. Ah Jim* (decided in the Sup. Ct. Montana, January 14, 1890).

Counsel for respondent, in this connection contends, that the Ordinances framed by the Constitutional Convention, and appended to the Constitution, were not a part of that instrument, and did not have the force and effect of constitutional provisions. For this reason, the provisions of the ordinance declaring that the Governor, Chief Justice and Secretary of Montana, should constitute a Canvassing Board to canvass the votes and declare the result of the election of members of the Legislative Assembly, was impotent to work a change or modification of the statute, providing that the certificates of election of such members shall be issued by the County Clerk. Hence that statute stands in full force, and the County Clerk's

certificate is the best *prima facie* evidence of a party's right to a seat in the Legislative Assembly.

No authorities have been brought to the attention of the court to sustain the respondent's position in respect to Ordinances framed and promulgated by Constitutional conventions.

It appears this question was raised in the case of *Stewart v. Crosby* (1855), 15 Texas. 546, wherein Justice WHEELER, in passing upon this point, says:

"We think it free from doubt that the Ordinance appended to the Constitution is a part of the fundamental law of the land. Having been framed by the Convention that framed the Constitution of the State, and adopted by the Convention and the people, along with the Constitution, it is of equal authority and binding force upon the executive, legislative and judicial departments of the government of the State, as if it had been incorporated in the Constitution, forming a component part of it."

The case cited appears to have involved questions of great importance, as shown by the remarks of the judge at the commencement of the opinion, as follows:

"In the argument of this case, questions of great moment to the parties, involving an inquiry respecting the constitutionality of the legislative enactments, which they have invoked, and on which they rely to maintain their claims, have been discussed."

Mr. Paine, in his work on elections, section 294, announces the same doctrine, as does the case of *Stewart v. Crosby, supra*, in the following terms:

"To launch a new constitution, certain machinery and arrangements are always necessary, which having subserved this single purpose, are of no further use. These might, of course, be provided in the constitution itself; but to incorporate temporary provisions into the body of a permanent constitution, would be to encumber the instrument with matter which might more properly be excluded from the text of the constitution, and placed in such a form as to be dropped when all the uses for which it was provided, have been fully subserved. Accordingly, these provisions for inaugurating new state constitutions, usually take the form of detached ordinances, or schedules. The validity and effect of these provisions are precisely the same, whether they are placed in the ordinance or schedule, to be thrown aside when no longer needed, or imbedded in the text of the constitution, to remain a permanent blemish, after the accomplishment of all the purposes for which they were required. It is clearly competent for a constitutional convention, by an ordinance or schedule, to change the time for holding the general election of the state. * * * The people of the state in their constitutional conventions are always their own masters. There is nothing to restrain them from giving whatever form they prefer to its organic law, except the Constitution of the United States and treaties made and laws enacted by the United States in pursuance thereof."

To declare that the County Clerk's certificate of election to the office in question is the highest *prima facie* evidence of title to the office, as against the certificate of the Canvassing Board constituted by the act of congress, and the ordinance framed by the constitutional convention and adopted by the people, would be in effect to declare that the provisions of the statute in this respect stand without modification by the Act of Congress and Constitution and Ordinances, and prevail over them. If the Ordinance did not work a change in the statute, in this particular, how can it be maintained that the same ordinance worked such important changes in other respects? The effect of ordinance Number Two was to determine the terms of all the elective officers of the Territory of Montana, while under the literal statutory provisions, their terms of office would have continued for more than a year. And under that theory, the officers elected at the late election, under this ordinance, who have taken possession of these offices, are there without authority.

The logical analogies of this theory need not be further traced. It destroys itself by its inherent fallacy, without the force of the authorities above quoted to the contrary.

The Constitutional Convention was authorized, by Act of Congress, to make provision, "by ordinance" for the election of officers for full state government.

In the body of the constitution, at Section Seventeen of the Schedule, the state officers to be "duly elected and qualified, as provided by ordinance," are referred to. The Ordinance was framed and adopted by the Convention, promulgated to the people, and by them ratified.

The provisions of the Constitution and Ordinance, relating to carrying out the election, to set in motion the state government, was intended for immediate execution within a short time after the constitution was framed. The plain intent of the convention when framing Ordinance Number Two is shown in the provision dividing the state, legislative and district officers into one class, and directing that the returns of the election of these officers should be made to the Secretary of the Territory, and canvassed in the same manner and by the same Board as the vote upon the Constitution. And in the

"ninth" paragraph of that ordinance, the election of the county and township officers was provided for. And the "tenth" paragraph provides that the votes for the above county and township officers, and for Clerk of the District Court, shall be returned and canvassed as is now provided by law.

The effect of the Ordinance upon the statute is to change and modify its provisions so far as is necessary to give the provisions of the Ordinance full scope and effect. It follows that the relator's certificate of election emanates from the legally constituted canvassing board and will be admitted in this action as *prima facie* evidence of his election to the office in question.

The facts of attendance upon the sessions of the house, and as to distance traveled are asserted by the affidavit of the relator, and admitted by the verified answer of respondent. No question has been raised upon these matters, set forth in relator's affidavit.

The constitution of the state fixes the amount of compensation at \$6 for each day's attendance and 20 cents per mile for each mile necessarily traveled, by the nearest usually traveled route in going to the seat of government from the member's residence, and returning thereto. And the relator's claim conforms to these prescribed rates.

It remains to be determined whether the law enjoins upon the State Auditor the duty of auditing and settling said claim and issuing to the relator a certificate thereof.

Section 121, Fifth Div. Comp. Statutes, provides as follows :

"He shall audit all claims against the treasury and when the law recognizes a claim, but no appropriation has been made therefor, shall settle the claim and give the claimant a certificate thereof, and report the same to the legislative assembly."

This provision of the statutes should be considered in connection with section 20 of article 7, of the State Constitution, which provides as follows :

"Section 20. The Governor, Secretary of State and Attorney General shall constitute a Board of State Prison Commissioners, which Board shall have such supervision of all matters connected with the state prisoners as may be prescribed by law. They shall constitute a Board of Examiners with power to examine all claims against the State, except salaries, or compensation of officers fixed by law,

and perform such other duties as may be prescribed by law. And no claim against the State, except for salaries and compensation of officers fixed by law, shall be passed upon by the Legislative Assembly without first having been considered and acted upon by said board."

The section of the statute above quoted provides that the Auditor "shall audit all claims against the treasury, and when the law recognizes the claim, but no appropriation has been made therefor, shall settle the claim and give the claimant a certificate thereof, and report the same to the legislative assembly." The Constitution has created a Board of Examiners, with power to examine all claims against the State, except salaries or compensation of officers fixed by law, and provides that "no claims against the state, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board."

The salaries or compensation of officers fixed by law, being expressly in all cases excepted by the provisions of the Constitution, from the action of said Board of Examiners, the duty of the State Auditor, under the statute, is clear as to the relator's claims. No other class of claim against the State is presented in this action than the compensation of an officer fixed by law. However, it is deemed proper to consider the statutory and constitutional provisions together, so that no misapprehension will arise as to the decision herein.

The relator asks that his claim against the State for compensation for service as a member of the House of Representatives of the legislative assembly of this State, for the fifty-four days attendance at the sessions of that body, together with mileage for seventy-five miles traveled by the nearest usually traveled route from his residence to that assembly, at the rate fixed by law, amounting to \$339, be audited and settled, and that a certificate thereof be given him by the respondent, Edwin A. Kenney, Auditor of the State of Montana. Under the provisions of law and the showing in this action, it is held by this court that the relator is entitled to the relief prayed for; that the relief prayed for is a duty specially enjoined upon the State Auditor as resulting from

his office; that the writ of mandamus is the proper remedy herein.

WHEREFORE, It is ordered that a peremptory writ of mandate be issued in the form provided by law, as prayed for in relator's affidavit.

Note.—Chief Justice Blake having been a member of the Canvassing Board mentioned in the above opinion, did not sit in the hearing and the determination of this action.

In Pennsylvania a new Constitution was prepared by a Convention authorized to be held by an Act of Assembly, approved April 11, 1872 (P. L. 53), and was adopted by a considerable majority at an election held on the sixteenth of December, 1873. The Convention had provided by the Schedule annexed to the proposed Constitution, that *Section 1*. "This Constitution should take effect on the first day of January, in the year 1874, for all purposes not otherwise provided for therein." The Act of 1872 (§6), provided for the counting of the votes and a proclamation of the result of the election by the Governor; and if a majority of the votes were polled for the proposed Constitution, such new or revised Constitution should be thenceforth, the Constitution of this Commonwealth. The possible conflict between the Schedule and the Act of Assembly, matured by the counting of the votes on the sixth day of January, 1874, and the proclamation of the Governor on the seventh day of January, 1874. This action was in accordance with a decision (*Wells et al., v. Bain et al.*, December 6, 1873, 75 Pa. 39), upon an application for an injunction from the Supreme Court of Pennsylvania, to restrain the holding of the election of December 16, 1873, so far as concerned the City of Philadelphia, by special officers chosen by the Convention, in lieu of the regular election officers. The injunction was granted upon the ground that the Convention derived its powers

from the Act of 1872, which provided for the conduct of this election "as the general elections of this Commonwealth are now by law conducted;" (§6.) consequently, an Ordinance of the Convention could not contravene the law.

Wells v. Bain was followed by *Woods Appeal*, decided November 2, 1874, and reported in the same volume (75 Pa. 59). The Supreme Court affirmed the cardinal doctrine that the Convention had no absolute authority. "The people have the same right to limit the powers of their delegates" to a constitutional convention, "that they have to bound the power of their representatives" in the legislature.

"The question is not upon the power of the legislature to restrain the *people*, but upon the right of the people, by the instrumentality of the law, to limit their delegates. Law is the highest form of a people's will in a state of peaceful government. When a people act through a law, the act is theirs, and the fact that they used the legislature as their instrument to confer their powers, makes them the superiors, and not the legislature. The idea which lies at the root of the fallacy, that a convention cannot be controlled by law, is that the convention and the people are identical. But when the question to be determined, is between the people and the convention, the fallacy is obvious. *

* * No argument for the implied power of absolute sovereignty in a convention can be drawn from revolutionary times, when necessity begets a

new government. Governments, thus accepted and ratified by silent submission, afford no precedents for the power of a convention in a time of profound tranquillity, and for a people living under self-established, safe institutions:" AGNEW, C. J. pp. 71, 72, 73; the same effect is the opinion of the Justices, January 23, 1883, 6 Cushing (Mass.) 573.

Notwithstanding these sentiments, SHARSWOOD, J., in *Northampton Co. v. Lehigh C. & N. Co.*, decided May 11, 1874, and reported in the same volume (75 Pa. 461), incidently remarked "the Constitution did not go into operation until January 1st, 1874, Schedule, Sec. 1." This quite agrees with ruling in Texas: *infra* page 245.

This Pennsylvania incident is cited as a strong method of distinguishing the principal case in several particulars. And, first, in the principal case, unlike that in Pennsylvania, no question did or should arise as to the power of the convention to make an ordinance. Consequently a discussion of the powers of a constitutional convention may be omitted here, with the caution that the language quoted on page 235 is entirely too loose even for the purposes of the principal case. Second, both in Pennsylvania and in Montana, schedules were properly appended to the proposed constitutional provisions; this will appear from a brief examination into the functions and force of such temporary additions.

The true function of a schedule or ordinance accompanying a proposed Constitution and submitted for the approval of the voters at the same time, came up for decision in *Watson v. Chester & D. R. R. Co.* (1877), 83 Pa. 253, 255. The Court, speaking through Chief Justice AGNEW, said that the Schedule to the Pennsylvania Con-

stitution of 1874 was "intended to bridge over the chasm between the two frames of government, and make the transition, from one to the other, easy and without unnatural disturbance of the affairs of the people." To the same effect are *Sigur v. Crenshaw* (1853), 8 La. An. 401, 422; citations *ante* page 235; *The Comm. ex rel. v. Collins* (1839), 8 Watts. (Pa.) 348, 336; *Pleasantman v. Thornton*, (1875), 52 Ala. 559, 568. *Griffin's Ex'r v. Cunningham*, (1870) 20 Grat. (Va.) 31; *The Richmond Mayoralty Case* (1870), 19 id. 673.

Such being the purpose of these additional documents, their force may readily be inferred and has not involved much contention. Thus, in *Ridley v. Sherbrook* (1866), 3 Coldw. (Tenn.) 569, 575, the effect of a schedule, submitted and adopted by the requisite ballots, was discussed. Lack of time prevented more than an announcement of the decision, that "the provisions of the Schedule, for all the purposes for which they were designed, [became part of the Constitution], and had all the force of constitutional provisions." Hence the provisions of the ninth section of the Schedule, authorizing the General Assembly, at its first ensuing session, to fix the qualification of voters, was valid and abrogated the provisions of the previous Constitution of 1834.

This Tennessee decision was followed in *State v. Johnson* (1870), 26 Ark. 281, being the only one on the point, accessible to the Supreme Court of Arkansas.

Years before, the same result had been reached in Pennsylvania in *The Comm. ex rel. v. Collins* (1839), 8 Watts. (Pa.) 331, 335, 348, and, also, in 1855, in Texas, *supra* p. 235.

It is true that an Ordinance appended to the Constitution of Alabama, framed in 1819, was denied to be such part of

that instrument as only to be "abrogated and annulled in the same manner as any other part." *GOLDENWALL, J. Duke v. Cherokee Nav. Co.* (1846), 10 Ala. 82, 88. The Ordinance provided, among other things, that "all navigable waters within this State shall forever remain public highways, free to the citizens of this State and of the United States, without any tax, duty, impost, or toll therefor, imposed by this State; and this Ordinance is hereby declared irrevocable, without the consent of the United States." (1 *Poore's Const.* 46.) This Ordinance was merely the acknowledgment of this obligation, laid upon the Convention by § 6 of the enabling Act of March 2, 1819; 3 Stat. at L. 492. The State, by Act of January 10, 1827, incorporated the Navigation Company and authorized it to charge and collect tolls: to this Act Congress gave assent by their Act of May 24, 1828; 4 Stat. at L. 308. The Alabama Court very properly said, that "The State Government being invested with the entire authority of the people, except where they have chosen to restrict the government, it follows that all the external relations of the people, with the citizens of other States, or with the Government of the United States, must be conducted by the State government. The Ordinance itself indicates that it is revocable with the consent of the United States, and as the consent of the people of this State can only be expressed through the State government, it follows that when the assent of both is given by the constituted authorities of each, the powers disclaimed, may be resumed and immediately exercised by the State authorities, under the general powers, these not being restricted otherwise than by the Ordinance." (10 Ala. 88-9.) All this is still true, and was precisely the course taken during the reconstruction of the Southern States, the

State Legislatures being required to make certain alterations in the proposed Constitutions before Congress would approve them: see the cases of *Shorter v. Cobb*, (1869), 39 Ga. 285, 303-4; *Hordmann v. Downer* (1869), id. 425, 443-4; *Peak v. Swindle* (1887), 68 Texas 242, 248; *The State v. Williams* (1873), 49 Miss. 640, 661; *Plowman v. Thornton*, (1875) 52 Ala. 559, 565.

A Schedule, or Ordinance, proposed by a Constitutional Convention and within the powers confided to such a body, has now sufficiently appeared to be of equal force with the provisions of the amendment or new constitution itself, and, therefore, the question may now be considered as to the time when a constitutional provision becomes the supreme law.

As some of the cases to be cited, arose from the reconstruction of the Southern States, and a full discussion of these cases would involve the powers of Congress, much in the same manner, as the principal case might equally challenge those powers, it will not be amiss to state briefly that there are three theories of the time when the transformation occurs from a Territory of the United States into a State of and in the Union. Beyond this, the discussion of the powers of Congress is unnecessary and would distract from the main question for this annotation: that is, *at what time is a constitutional provision the supreme law?*

The three theories were alluded to in the opinion delivered in *Secombe v. Kittelson* (1882), 29 Minn. 555, 559, as follows: *First*, that the adopted Constitution of the new State cannot take effect, and the new government cannot go into operation, until Congress admits the State into the Union. This would leave the State still a Territory, until admission. This theory has been

exploded by the decisions upon the reconstruction Constitutions of Virginia, Mississippi and Texas, *infra*.

Second, that the adoption of a State Constitution, under the provisions of an enabling Act of Congress, and the formation of a State government, create a State, although not in the Union. This theory seems to be the proper one and to exclude any effort to organize a State without permission of Congress: *Shorter v. Cobb* (1869), 39 Ca. 285, 298, 299; *Hardeman v. Downer* (1869), id. 425, 443.

Third, that compliance with any conditions required by Congress, (as the ratification of the last amendment to the Constitution of the United States,) is sufficient to complete the organization of the State. This theory does not seem to be law, under the Virginia, Texas and Mississippi decisions, *infra*.

Coming now to the consideration of the question as to when the constitutional provision becomes the supreme law, and overrides previous constitutions and laws, the argument presented for the respondent may be observed; for it will appear to be a suitable introduction to the answer required to sustain the Montana Court.

No doubt the contention in the principal case was based upon a sound premise, considered by itself. That is, if there had been no Ordinances of the Convention and no provisions in the Act of Congress authorizing such Ordinances, the Constitution, when adopted, would have required legislation to put it into operation, and would seem to be subject to the same rule of common sense which perpetuates former legislation when a State adopts a new Constitution or amends an existing one. That is, where legislation is necessary to give effect to constitutional provisions and former legislation is not abrogated

by the new provisions, such former legislation continues until new laws are enacted: *Cahoon's Case* (1871), 20 Grat. (Va.) 733, 789; (composition of grand juries); *Supervisors v. Stout* (1876), 9 W. Va. 703, 705 (road juries).

Perhaps it might be safe to go further and say that where legislation is not necessary for the operation of the new constitutional provisions, that a literal interpretation will not be adopted unless absolutely required. This may be understood from the following case, though the decision there finally turned upon the necessity of legislation to enforce the plain prohibition.

The effect of the third section of the Fourteenth Amendment to the Constitution of the United States, came into consideration before CHASE, C. J., in *Cesar Griffin's Case*, heard in the United States Circuit Court for the District of Virginia at May term, 1869, and reported in Chase's Dec. 364-426. The words of the Amendment are: "3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Under this section, Griffin prayed for discharge, under a *Habeas Corpus*, from a conviction in a criminal court presided over by a person who had, as a member

of a State legislature, engaged in insurrection or rebellion against the United States. The discharge was refused, CHASE, C. J., saying—"In the examination of questions of this sort, great attention is properly paid to the argument from inconvenience. This argument it is true, cannot prevail over plain words or clear reason. But, on the other hand, a construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great a degree, unless the terms of the instrument absolutely require such preference.

*** But, in all these [Southern] States, all offices had been filled, before the ratification of the Amendment, by citizens who, at the time of the ratification, were actively in the performance of their several duties. Very many, if not a majority of these officers, had, in one or another of the capacities described in the third section, taken an oath to support the Constitution, and had afterwards engaged in the late rebellion; and most, if not all of them continued in the discharge of their functions after the promulgation of the amendment, not supposing that, by its operation, their offices could be vacated without some action of Congress. If the construction now contended for be given to the prohibitive section, the effect must be to annul all official acts performed by these officers." (pp. 417, 418.) And after alluding to the fifth section, the Chief Justice proceeded,— "Taking the third section then, in its completeness with this [its] final clause, it seems to put beyond reasonable question, the conclusion that the intention of the people of the United States, in adopting the Fourteenth Amendment, was to create a disability, to be removed, in proper cases, by a two-thirds vote, and to be made operative in other cases, by the legislation of Congress, in its

ordinary course." (p. 422.)

So far as confirming the power of such a *de facto* judge, the Chief Justice announced (pp. 425-6) that he was authorized to say that his action was in accordance with the unanimous opinion of the other Judges of the Supreme Court of the United States, who had examined into the case upon an application for a writ of prohibition against the United States District Judge who had ordered the discharge of Griffin upon this *Habeas Corpus*. The case came before the Chief Justice on an appeal from the District Judge's order of discharge.

The principle here upheld was before the judges of the reconstructed States, but was properly thought inapplicable where legislation was not needed: see especially the opinion in *The State v. Williams*, (1873), 49 Miss. 640, 664, 682, where *Musgrove v. Leachman* (1871), 45 id. 511, was distinguished.

When the Territory of Minnesota passed into the State of that name, the difference between the Territorial law and the Constitution of the new State, gave rise to the case of *Parker v. Smith* (1859), 3 Minn. 243. The defendant was elected to be the District Attorney of Dakota County, at the same, as the electors voted for the proposed Constitution of the new State, but his time of residence had been insufficient under the Territorial laws to become a candidate for office, though ample under the Constitution then approved by the necessary ballots of the electors. The Territorial laws were applied, the Court saying, that "the Constitution was not operative until after its adoption by the people, and did not change any rights, duties, requirements, or obligations that were created by, or dependent upon any Territorial act until it had received such sanction." Not that the Court took the Pennsylvania and New York view of the adoption when the votes had

been fully counted: *Infra.* page 247 A far less tenable theory was advanced: "At the election in October, 1857, at which the Constitution was submitted, there were two distinct elections, although held on the same day and at the same places, for convenience. This was absolutely necessary in the event of the Constitution being rejected by the people, in which case all the votes cast for any of the officers created by the Constitution, would have been of no effect, and the whole State scheme would have fallen to the ground, and the Territorial form of government would have continued as if no such election had taken place, and all the officers, from Delegate to Congress to those of precinct jurisdiction, elected under the Territorial Laws, would have entered upon their functions precisely as they did the previous year." FLANDRAU, J., (id.) 243-4. But this theory overlooks the origin of the new officers, such as members of Congress, as well as those of the same function in Territory and in State, and was probably based upon the language of the enabling act of Congress (February 26, 1857, 11 Stat. at Large 166) which differed from the enabling act for Dakota, Montana and Washington (February 22, 1889, 25 Stat. at Large 676), in authorizing the Convention (§ 3) to determine whether the people desired admission as a State, and if so, authorized the framing and submission of a constitution, and, also, (§ 4) in the event said convention shall decide in favor of the immediate admission of the proposed State into the Union, providing for a special census for the basis of the representation in Congress. In the Act of 1889, no State could come into existence without adopting its Constitution (§§ 7 and 24) and the difficulties which might arise from use of this theory, can be inferred from reflection upon the case of *Secombe v. Kittelson* (1882), 29

Minn. 555, where the Court dismissed a discussion upon the power to amend the State Constitution, not yet in force according to this theory, by a rough and ready and common sense short cut, that this amendment had afterwards been amended out of the Constitution: (id. 561.)

The weight of *Stewart v. Crosby*, ante page 235, is much diminished by the absence of any explanation of the reasons upon which it is founded. "The time remaining will not permit an extended discussion of even the material questions in the case, on which its decision depends. But as a decision at the present Term is earnestly desired by the parties, and may be important to the attainment of their rights, we shall proceed to dispose of the case, upon grounds deemed clear and sufficient to determine the litigation between the parties; and shall state only our conclusions upon the material questions involved in the decision; so as to indicate distinctly the grounds of our judgment; reserving for a future occasion, it may be for a future case, the statement at length of the reasons on which we rest our conclusions:" WHEELER, J. pp. 547-8.

Perhaps the disposition of the Texas judges can be fathomed after consideration of a much later decision rendered by their Supreme Court, in the case of *Peak v. Swindle* (1887), 68 Texas 242, which turned on the suspension of the Statute of Limitations during the secession period, by the reconstruction Constitution. "The inquiry as to when the Constitution, ratified by the people in 1869, became operative, is now directly presented; and if it be true that it so became when ratified by the people, it is clear that the instructions given were correct and that the judgment, as to the appellee, must be affirmed. * * * These acts, which led to the formation of the Constitution,

its adoption, and the admission of the State to representation in Congress, not only evidence the opinion of Congress, that the Constitution took effect before the State was admitted to representation, but also evidence the intention of the people, from whose will alone a constitution could have an existence, that it should be operative prior to the time the State was admitted to representation. * * * When did the people 'ordain and establish this Constitution' [Preamble]? As their act, and not the will of Congress, ordained and established it, this must have been accomplished when the will of the people was manifested at the election [to ratify or reject the proposed Constitution]. At no other time was expression of the will of the people, as to whether or not the Constitution framed by the Convention, should become the Constitution of the State, ever given.

The Constitution fixed the terms of office for State officers, and declared that these should run from the day of general election; and the election declaration, passed by the convention, recognizing that fact, and intending to leave no uncertainty as to the time when the terms of all State, district and county officers should commence, declared that 'the said election, for State, district and county officers, should be conducted under the same regulations as the election for ratification or rejection of the Constitution, and by the same process. * * * The same declaration also fixed a time at which the Legislature, elected under the Constitution, should meet, as did the Constitution fix the congressional, senatorial and representative districts, in which Congressmen, Senators and Representatives were required to be, and actually were, elected at the same election at which the Constitution was adopted. All these officers were elected, and held under the Constitution, and

the members of the Legislature were, by its terms, required, as a legislature, to do acts [*e. g.*, ratify the Fourteenth and Fifteenth Amendments to the Constitution of the United States,] which necessarily preceded the admission of the State to representation in Congress. (Act of Congress, April 10, 1869, 16 Stat. at Large 41; Pas. Dig. art. 1136; Constitution, art. 3, sec. 36.) The entire Constitution bears evidence that it was the intention of the people that it should become operative when adopted by them, and there is nothing in it to indicate an intention that any part of it should be inoperative until Congress admitted the State to representation. If such an intention was evidenced, it should be given effect, for it would be competent for the people of a State, the sole Constitution making power, to determine that a Constitution should not be operative until the happening of a future event, dependent upon the action of some other body; but, as no such intention is evidenced, and as a valid State Constitution might exist without reference to the will of Congress, and although the State, by that body, was denied representation, we are of the opinion that the Constitution became operative, in all its parts, from the time it was ratified by the people. That Congress deemed the condition of the country such, at the time the Constitution was adopted, as to require continuance, for a period thereafter, of a provisional government, and to deny to the State a representation in Congress, until it was satisfied that the Constitution was in harmony with that of the United States, and that the time had come when the provisional government should be withdrawn, is a matter of no consequence in the consideration of the question before us." STAYTON, A. J., pp. 247, 248, 249, 250.

These last words have reference to

the seventh section of the Act of Congress: "That the proceedings in any of the said States shall not be deemed final, or operate as a complete restoration thereof, until their action, respectively, shall be approved by Congress." The other States besides Texas were Virginia and Mississippi, and decisions there were made to the same effect: *State v. Williams* (1873), 49 Miss., 661; *In re Deckert* (1874), opinion by WAITE, C. J., sitting in U. S. Circuit Ct. E. Dist. Va., 10 Natl. Bank. R. R., 1; s. c. 2 Hughes C. C. Rep. 187; *Campbell v. Fields* (1872), 35 Texas 752, all cited in the opinion just quoted from. So also *Foster v. Daniels* (1869), 39 Ga. 39 decided with regard to the enabling act of Congress of June 25, 1868, and the President's proclamation of July 27, 1868, 15 Stat. at L. 74, 708. And some years earlier in *Secombe v. Kittelson* (1882), 29 Minn., 555, this question was stated, but not decided, the Court recognizing the three theories of the time when a Territory becomes a State, and citing *Campbell v. Fields*, *supra*, and *Scott v. Detroit Young Men's Society Lessee* (1843), 1 Doug. (Mich.) 119, which followed the last of these theories.

An opposite view to that taken in Texas was expressed in Alabama: "Prior to the passage of that Act of Congress [Act of June 25, 1868, 15 Stat. at Large 73, readmitting North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida], it had been held by the officers in charge of the election and its returns, that the said Constitution had not been adopted by the votes of the people of Alabama. Hence, we affirm that said Constitution became operative and obligatory in Alabama only on the twenty-fifth of June 1868;" *STONE, J., Irwin v. The Mayor* (1876), 57 Ala., 6, 10. The question has never been fully discussed in that State, but always assumed to be

answered as above: *Pierman v. Thornton* (1875), 52 Ala. 559, 567-8.

Several years previous, the Court of Appeals, which is the next inferior Court, had been called upon to decide the time when an Amendment to the Constitution of Texas took effect, so as to render void a session of a County Court, whereat there had been a conviction for aggravated assault and battery. The election for the adoption of the proposed Amendments took place August 7, 1883, and no special provision having been made for the counting of the votes, that duty by the general law fell to the Secretary of the State, on the fortieth day after the election. The trial occurred September 8, 1883, during the forty days, and was held valid. "It is unnecessary for us, in this case, to decide whether, under the provisions" of Article 17 of the Constitution, that *the said amendment, so receiving a majority of the votes cast, shall become a part of the Constitution, and proclamation shall be made by the Governor thereof*—"an Amendment, *eo instanti*, becomes operative, or whether it derives its operative force from the Governor's proclamation, declaring the fact of its adoption. We are clearly of opinion, however, that until after the expiration of forty days from the election, under our general election laws, the amendments, until the returns are opened and counted by the Secretary of State, can in no manner be considered as operative, so as to affect, modify, change or nullify existing laws." *WHITE, P. J. Sewell v. The State* (1883), 15 Texas. App. 56, 61.

In the same term the said Court was called upon to decide whether a criminal trial, held after the votes on these same Amendments had been counted, but before the Governor's proclamation, was subject to these Amendments. "Our construction of this provision is

that it is the ascertained majority of the vote of the people, and not the proclamation of the Governor, which gives force and effect to Amendment. If the Governor were to neglect or refuse to issue such proclamation, the amendment would, nevertheless, be a part of the Constitution of the State, because it is the will of the people, expressed in the mode prescribed by their organic law. It certainly never was intended that it should be within the power of the Governor thus to defeat the solemnly declared will of the people. We are of opinion, therefore, that as soon as the election returns were canvassed, and it was ascertained that a majority of the votes cast were in favor of the amendment, it became a part of the Constitution and was in full force and effect from that date." *Willson, J. Wilson v. The State* (1883), 15 Texas App. 150, 153.

This latter position of the Texas Court quite agrees with *The Comm. v. Collins* (1839) 8 Watts (Pa.) 331, where the recent Amendments to the Constitution of Pennsylvania were, according to the second section of the accompanying Schedule, to "take effect from the first day of January, 1839." Upon the time when these Amendments were adopted, not when they took effect, depended the right of Judge Oristus Collins to the office of President Judge of the Lancaster County Court. Counsel for the defendant, Collins, contended, among other things, "that the bare ascertainment of the vote of the electors, approving of the Amendments proposed by the Convention cannot, with any color of propriety, be regarded as the adoption of the Amendments; that it could, at most, only amount to a promulgation of the vote given thereon; so that the citizens throughout the State might become informed thereof before the first day of January, 1839, when the Amendments,

according to the express declaration contained in the second section of the Schedule, were to take effect. * * * that the general election in October, 1838, being the time when the people, by their vote, approved of the Amendments, may very properly be regarded as the time when they, by their vote then given, *agreed* merely that the Amendments should be received into, and *adopted* as constituent parts of the Constitution on the first day of January, 1839." (Per KENNEDY, J., *id.* 338). But the Court denied these propositions, citing *Owings v. Speed* (1820) 5 Wheat. (18 U. S.) 420, to the effect that a constitution may be adopted even anterior to the time of its coming into effect, and adding that "Under this view, we have come to the conclusion that the Convention, in using the expression—'at the adoption of the Amendments to the Constitution,' could not have intended to refer to a later point of time than the day when the result of the vote of the electors thereon was to be ascertained and made known by the Speaker of the Senate, from the official returns thereof. And it may be that an earlier point of time was intended; but according to our construction of the Amendments, as regards the main question before us, it is not material whether an earlier day was intended or not." (*id.* 341.)

HUSTON, J., in the course of his dissenting opinion, said—"Neither the Legislature, nor any branch of it, were required to do any act, except count the votes and certify the result; and the Governor had no duty, nor power, except to proclaim the result. The sanction of neither Legislature nor Governor was required, and whether they approved, or disapproved of it, did not affect its validity. The people, by their votes, approved, or adopted, or ratified, or established it, and they acted on the ninth of October, 1838.

In a popular sense, they then adopted it; but they adopted it as written, and no otherwise. A Schedule was subjoined to it, and forms part of it; most of its provisions are temporary, and when once acted on become useless; but they have the same force and obligation as the other parts of the instrument, and are derived from the same source, viz.: the people." (8 Watts Pa. 348.) The dissent then proceeds to identify the time of the adoption of the Amendments with the time fixed by the Schedule, for their taking effect. A similar conclusion, was reached, years afterwards, in New York; see *infra*, page 249: *The People v. Gardner* (1871), 45 N. Y. 812. As applied to the facts of the principal case, these differences amount to nothing, as they merely serve to emphasize the power of a Schedule, or Ordinance, or special provision to override pre-existing laws or constitutional provisions.

The Texas decisions are thus at one but do not reach the extreme of the principal case, whose correctness depends, like the Pennsylvania cases, upon the power of the instrument itself, including the Ordinance as part of the Constitution.

The opposite view had, long previous, been expressed by BUGHANAN, J., dissenting from the opinion of the Court in *Sigur v. Crenshaw* (1853), 8 La. An. 401, 426. The majority of the Court held that a new constitution superseded a previous one, and did not operate as an amendment, so as to continue existing laws. The dissenting judge said—"I cannot concur to its full extent, in the view taken by the relator, of the effect of the promulgation of the new Constitution of Louisiana, in the place of the old one, which was abrogated; namely, that without some saving clause, it would have dissolved the whole frame of government, and the obligation of laws previously en-

acted. Such results belong to revolution the offspring of intestine commotion, or of foreign conquest, which changes the allegiance of a nation, substituting monarchy or oligarchy, for democracy, or *vice versa*,—or which reduces an independent state into a subject province. They have nothing in common with the peaceful changes so frequent in their occurrence, which the combined republics of our political confederation find it expedient from time to time, to introduce into the details of administration of a government always essentially the same, because it always recognizes the same source of authority—the people." These sentiments never attained to any further judicial dignity: in Louisiana, the majority view was reaffirmed in *The State v. Dubuc* (1854), 9 La. An. 237.

More nearly resembling the principal case is that of *The State ex rel. Huud v. Timme* (1882), 54 Wis. 318. The relator sought by mandamus, to have the Secretary of State audit his salary as State Senator, under the provisions of certain Constitutional Amendments which did not specifically provide for the time of their operation. The Court examined into the mischief, and the remedy and then construed the Amendments, saying (per Taylor, J.)—"It would be absurd to hold that there was any intention, on the part of either the legislature or the people, to interrupt the regular course of government of the State by the adoption of these amendments." (p. 327.) And the Court held, under such circumstances, that the Amendments did not go into effect until an election had been held for senators and representatives, and quashed the mandamus.

This decision was largely based upon an opinion of the Justices of the Supreme Judicial Court of Massachusetts in 1855, in response to certain questions proposed by the Governor and Council of

that State: reported, 3 Gray (Mass.) 601. An Amendment to the State Constitution, adopted that year, contained no express repeal of pre-existing provisions of the Constitution, and, to come into practical operation, required legislation, dividing the State into districts, before the members of the Council could be voted for. Consequently the pre-existing provisions of the Constitution governed in the meantime: id. 602, 604. But upon another point, the opinion significantly proceeds: "The fourth article provides for the election of the secretary, treasurer, auditor and attorney general. The time for giving in of the votes for these officers, the mode of declaring, certifying and returning the votes, are all definitely provided for by the article itself, so that no legislation is necessary to give it effect. * * * But as this Amendment of the Constitution, and the elections made under it, cannot so operate as to fill these offices, until the third Wednesday of January next, we are of opinion, that, up to that day, appointments to these offices are to be made, removals effected, and vacancies filled, in the same manner as if this Amendment of the Constitution had not been made:" id. 604.

The Wisconsin Court also referred to *State v. Scott* (1849), 9 Ark. 270. where the Court sustained the response to a *Quo Warranto*. An Amendment to the State Constitution provided that "The qualified voters of each judicial circuit in this State, shall elect their circuit judge." The Court held that this did not vacate the offices of existing circuit judges, but that they might serve out their respective terms. "If the Amendment will bear such a construction as to allow other provisions of the Constitution to stand without doing violence to any, it is then clearly permissible to put such a construction upon it. If the intention was to create

vacancies, is it not fair and reasonable to suppose that words would have been employed, directly and emphatically declarative of that purpose, and that no room would have been left for doubt or construction?"—JOHNSON, C. J., p. 277. And WALKER, J., equally with the Chief Justice, planted himself upon the rules laid down by Story, Com. on Const. §§400, 405, 419.

SCOTT, J., dissented on the ground "that the presumptions of law are always in favor of the immediate operation and effect of the organic law, when applied to a convention of the people assembled for the purpose of remodeling the entire State Government; or, for the moment, doubt that the new Constitution adopted by such convention, would be in force from the moment of its adoption, unless provision should be made in the instrument itself to postpone its operation and effect to a future day. And I will take the occasion here, to remark that, so far as my research has extended, with all the facilities afforded by the able and industrious counsel, I have found that it has been the uniform course in all the States of this confederacy, not only when the entire State Government has been remodelled, but also in cases where amendments to the Constitution have been adopted, which, like this one, withdraws sovereign powers, or which necessarily disorganizes some part of the existing government, to adopt simultaneously with such Constitution, or such new amendment, a schedule or proviso, to sustain the old state of things, and prevent *pro tem.* the disrupting influence of the new Constitution or amendment." id. 294.

Another reference of the Wisconsin Court was to *State v. Ewing* (1853), 17 Mo. 515, which was a similar case to that before the Arkansas Court and was similarly decided, the incumbent being the Secretary of State.

Still another reference was to *The People v. Gardner* (1871), 45 N. Y. 812, affirming s. c. 59 Barb. (N. Y.) 198. The Supreme Court was called upon to construe a constitutional provision respecting the judiciary which was to be in force "from and including the first day of January, next after its adoption by the people," in connection with another provision affecting judges "in office at the adoption of this article." Following an earlier decision in *Real v. The People* (1870), 42 N. Y. 270, the Court of Appeals distinguished these two provisions through the use of the words "by the people" in one of them, so that where these words were omitted, "the adoption of this article" meant no more than "the time when this article took effect," but where the full phrase "adoption by the people" was used, that meant an earlier day, namely, when the votes had been completed. That is, constitutional provisions have force and effect as soon as their own words indicate.

As this New York decision, in respect to the time when the people adopted, or expressed their will in respect to the proposed constitutional provision, appears to be similar to the older Pennsylvania case (*ante*, page 247), an extract from the opinion will be interesting in connection with the principal case. "The rule of the common law is, that every law takes effect from its passage, unless some other time is therein prescribed for that purpose: 1 Kent's Com. 458; Sedgwick's Stat. and Const. Law, 82 [2 ed. p. 66]." The opinion then proceeds:—"The result of the election, showing the adoption of this article by a majority of the votes cast, must, within the meaning of this rule, be deemed its passage. The canvass of the votes cast by the various boards of canvassers, as required by law, and announcing the result, and certifying the same as required by law, is as much a part of the

election as the casting of the votes by the electors. The election is not deemed complete until the result is declared by the canvassers, as required by law. When the result was declared by the State board of canvassers, the article was adopted, and under the rule became operative at once, unless from the nature of the provisions themselves, or those of some other law, it appears that it was to take effect at some future period, or unless it clearly appears that the intention of the framers of the article, and of those by whom it was adopted, was, that it should not take effect until some definite future time:" GROVER, J., *Real v. The People* (*supra*).

The attentive reader will already have observed that the Courts have not yet decided what is the earliest time when a constitutional provision takes effect. In the principal case, the enabling Act rendered a decision on this point unnecessary: equally so in the Texas case (page 245). In a subsequent case in Texas (page 246), and in earlier ones in Pennsylvania and New York (pages 247, 249-50), the time was fixed as soon as the fact of a majority of votes in favor of the constitutional provision had been ascertained, upon a complete canvass of the votes. The announcement of the result of the election was not the earliest period of time, because the officials might not make the announcement. Whether the counting of the votes in each precinct, and before these results of the election were officially aggregated, would be held to be an instant when the constitutional provision had been adopted, may be doubted, though any failure of election officials to secure the completion of the counting of the votes might urge the Court to fix so early a period as election day itself (see page 247).

The sum of the matter is, that a constitutional provision takes effect from the instant the will of the people has been ascertained. JOHN B. UHLER.

PULLMAN PALACE CAR CO. v. LOWE.

Error from District Court of Douglas County.

A. Steere, Jr., for defendant.

MAXWELL, J., Dec. 17, 1889. This action was brought by the defendant in error against the plaintiff in error, to recover the value of an overcoat, which, it is alleged, was lost or stolen from a Pullman car in which the defendant in error was a passenger, on the Wabash Railway, from St. Louis to Council Bluffs. The Court was requested to make special findings in the case, which it did, as follows :

"I find, as the facts proven on the trial of this case, that on the 18th day of April, 1887, the plaintiff took passage at St. Louis for Council Bluffs on the Wabash & St. Louis Railroad, and purchased a sleeping-car ticket from the defendant's agency at St. Louis, entitling him to a lower berth in the sleeping-car attached to the train which left St. Louis on the evening of that day. That the train left St. Louis at 8:25 P. M. That a short time before the train left plaintiff entered the sleeping-car, and, upon doing so, delivered his coat to the porter of the car, who took it, and placed it in the vacant upper berth of the section of which plaintiff had secured the lower berth. That, shortly after the train started, the sleeping-car conductor passed through the car, and took up the ticket which had been purchased by the plaintiff, and gave him in exchange therefor another ticket, known as a 'berth-ticket,' which was in turn taken up by the porter soon afterwards, when he prepared the sleeping berth for occupation by the plaintiff. That the next morning, when the plaintiff arose, he took out from the upper berth a portion of his clothing, and then saw his overcoat there, where it had been placed the evening before by the porter, and where he (the plaintiff) left it. That plaintiff was last to leave his berth, and, with the exception of a gentleman and lady, the last of the passengers to leave the car for breakfast that morning. That plaintiff went out to breakfast at the regular breakfast station, which occupied him about fifteen minutes, and that after breakfast he stood on the rear platform of the sleeper about ten minutes, smoking a cigar, and then went to his berth in the car, the same having been made up, and covered that night, as was missing. That he immediately called the attention of the conductor to the sleeping-car to the fact, who, after first disavowing any responsibility for the loss of the coat, after a time caused a search to be made through the car, and found it with the porter, who had put it in the vacant upper berth. That the porter testified to the fact of his placing the coat in the vacant upper berth, and that the conductor testified that he had given the plaintiff a new ticket in exchange for the one which he had taken up, and that the plaintiff had taken the seat at the breakfast station, and returned to the car at the breakfast station."

same time as the passengers, including the plaintiff, were at their breakfast, and that during the interval of about twenty-five minutes' absence of plaintiff from his berth in sleeping-car, between the time when he left the car for breakfast and the time when he returned into it, his berth was made up, and his overcoat abstracted.

"Conclusion of Law: I find, as a conclusion of law, that defendant was guilty of negligence in not properly guarding and taking care of property of plaintiff during his necessary absence from defendant's car, and that plaintiff was not guilty of negligence in the matter. I therefore find that defendant is liable to the plaintiff for the value of the overcoat, to wit, \$50, with interest thereon from April 20, 1887, to the first day of this term, \$3.75."

The rules of the company were also introduced in evidence in its behalf, but, as the defendant in error had no notice of them, they do not enter into the case.

The question presented, therefore, is the liability of a sleeping-car company for the loss of necessary wearing apparel of one who had paid the necessary sleeping-car charges, and was lawfully riding in one of its cars, which apparel had been placed in the care of the employees of the company. We find no case exactly in point, and as the question is a new one, not only in this State, but, to a great extent, in the other States of the nation, we are practically without precedents to aid us, and must adopt such rule as may seem just and equitable. It may be well to consider what the company undertakes to perform, and also what it does not undertake. The latter proposition will be considered first. It does not undertake to furnish the railway for its cars to run upon, nor the motive power to propel them, and hence is not entitled to compensation for the ordinary carriage of passengers. It does invite for hire all passengers holding first-class tickets to occupy its cars. In effect, it says to all such passengers: "We will furnish you safe, pleasant, commodious cars, with all possible facilities to prevent weariness and fatigue, with comfortable sleeping accommodations, and the necessary toilet facilities, if you pay the price demanded in addition to the ordinary fare." The nature of this undertaking is the question for consideration. On the one hand, it is claimed that, so far as the company holds itself out as performing the duties of an innkeeper, so far it should be charged with the strict liability of the same. On the other, it is sought to make the liability of the company merely that of a lodging-house keeper.

In the very able and carefully prepared briefs of the attorney for the plaintiff in error, we find the following objections to charging the company with the liability of an innkeeper. He says: It undertakes (1) to furnish accommodations to "first-class" passengers exclusively; (2) to furnish toilet accommodations to such passengers; (3) to furnish a certain specified seat or bed to such a passenger; (4) to furnish a servant who will respond to all proper demands on his service by such passengers, promptly and politely; but to do these four things for a limited time, which is agreed upon between it and each passenger in advance. It does not make even this agreement with all those who travel by rail. It makes this agreement with first-class passengers exclusively.

The distinction between an innkeeper and a lodging-house keeper is set forth in many cases, but is very well drawn in the case of *Cromwell v. Stephens* (1867), 2 Daly (N. Y.) 15, from pages 21 to 26, inclusive. After quoting the definition of an "inn," as given by Chief Justice OAKLEY in *Wintermute v. Clark* (1851), 5 Sandf. (N. Y.) 247, to wit:

"Where all who come are received as guests, without any previous agreement as to the duration of their stay or as to the terms of their entertainment."

And from *Willard v. Reinardt* (1853), 2 E. D. Smith (N. Y.) 148, in which the distinctions between a boarding-house and an inn were declared to be this:

"In a boarding-house, the guest is under an express contract, at a certain rate, for a certain period of time, but in an inn there is no express engagement; the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract."

And from *Carpenter v. Taylor* (1856), 1 Hilt. (N. Y.) 195, as follows:

"Mere eating-houses cannot be considered as inns. They are wanting in some of the requisites necessary to constitute them inns."

It will be seen that a distinction is attempted to be drawn between the sleeping-car company and an inn-keeper, because only a certain class can occupy such cars, viz., persons holding first-class tickets, whereas, at an inn, all who conduct themselves properly may be entertained.

There is great confusion in the decisions as to what constitutes an "inn." In *Calve's Case* (1584), 8 Coke, 32, it was held that inns were instituted for passengers and wayfaring men. In another case, an "inn" is defined to be a house where the traveler is furnished all he has occasion for while on the way: *Thompson v. Lacy* (1820), 3 Barn. & Ald. 283. Bouvier defines "innkeeper" to be

"The keeper of a common inn for the lodgment and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation."

The innkeeper is bound to take in and receive all travelers and wayfaring persons, and entertain them, if he can accommodate them, and the same is true of a sleeping-car company, as to all passengers holding a first-class ticket. The fact that persons holding second or third-class tickets agree, in effect, in consideration of lower fare, to waive their right to enter a sleeping-car, does not enter into the case, any more than that a traveler who, to avoid the expense of an inn, should stop at a private house. In any event, the company which sells sleeping-car tickets to all first-class passengers that may pay the price, to that extent stands in the same relation as an innkeeper who must for hire entertain those asking for entertainment.

A more difficult question is to properly define the word "guest" at an hotel. Parsons defines a "guest" to be one who comes without any bargain for time, remains without one, and may go when he pleases: 2 Pars. Cont. 151. This is not sufficiently comprehensive to be a proper definition. In *Walling v. Potter* (1868), 33 Conn. 183, S. C. 9 AMERICAN LAW REGISTER N. S. 618, the Supreme Court of Connecticut defines the word "guest" as follows:

"A guest is one who patronizes an inn as such." But it is said that none but a traveler can be a guest at an inn, in a legal sense. We do not suppose that the court intended, in the definition above quoted, to lay stress upon the word 'traveler.' It is used in a broad sense, to designate those who patronize inns. In *Wintermute v. Clark* (1851), 5 Sandf. (N. Y.) 247, the Court say that, in order to charge a party as an innkeeper, it is not necessary to prove that it was only for the reception of travelers that his house was kept open; it being sufficient to prove that all who came were received as guests, without any previous agreement as to the time or terms of their stay. A public house of entertainment, for all who choose to visit it, is the true definition of an inn. These definitions are really in harmony with

each other. Webster defines a traveler as 'one who travels in any way.' Distance is not material. A town-man or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, any one away from home, receiving accommodations at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such."

This, we think, is a correct definition of the word "guest," and we adopt the same. *Berkshire Woolen Co. v. Proctor* (1851), 7 Cush. (Mass.) 417: In the latter case, the guest made an arrangement as to the price to be paid per week, and it was held that this did not take away his character as a traveler and guest. See, also, *Hall v. Pike* (1868), 100 Mass. 495; *Norcross v. Norcross* (1865), 53 Me. 163; *Pinkerton v. Woodward* (1867), 33 Cal. 557; and a valuable article in 14 Cent. Law J. 206; *Hancock v. Rand* (1879), 17 Hun (N. Y.) 279. In *Dunbar v. Day* (1882), 12 Neb. 597, this Court held that an innkeeper was bound to take all possible care for the safety and security of the goods, money, etc., of his guests while in his house. And if the goods or money of a guest be stolen from the inn, through no fault or neglect of the guest, nor by a companion guest, and there is no evidence to show how it was done, or by whom, the innkeeper is liable for the loss. This, we think, is a correct statement of the law.

A "lodger" is defined by Bouvier to be

"One who inhabits a portion of a house of which another has the general possession and custody."

There is some confusion in the decisions, arising mainly from the want of a clear definition of what constitutes a "guest" as distinguished from a mere "lodger." Generally, however, a lodger is one who, for the time being, has his home at his lodging-place: *Phillips v. Evans* (1876), 64 Mo. 17. The rule, under the decisions, is not of universal application, but nearly so: *Phillips v. Henson* (1877), 30 Moak, Eng. R. 19; *Thompson v. Ward* (1871), L. R. 6 C. P. 327; *Bradley v. Baylis* (1881), L. R. 8 Q. B. Div. 195; *Ness v. Stephenson* (1882), L. R. 9 Q.

B. Div. 245; *Hickman v. Thomas* (1849), 16 Ala. 666; *Ullman v. State* (1876), 1 Tex. App. 220.

It will be seen that the engagement of the sleeping-car company, so far as it goes, is exactly the same as the duties assumed by an innkeeper. A passenger, on entering a sleeping-car as a guest,—because that is what he is in fact,—necessarily must take his ordinary wearing apparel with him, and some articles for convenience, comfort, or necessity. The articles, when placed in the care of the company's employes, are *infra hospitium*, and are at the company's risk.

The liability of innkeepers is imposed from considerations of public policy, as a means of protecting travelers against the negligence and dishonest practices of the innkeeper and his servants. Occasionally, no doubt, the innkeeper is subjected to losses without any fault on his part. This, however, is one of the burdens pertaining to the business, and the courts have deemed it necessary to enforce this wholesome rigor to insure the security of travelers. Besides, where loss is sustained, neither party being in fault, it must be borne by one of them, and it is no more unjust to place it on the innkeeper than on the guest. The liabilities incident to the business are to be considered in fixing the charges for the service: *Mason v. Thompson* (1830), 9 Pick. (Mass.) 283.

Except in the matter of furnishing meals, there seems to be no essential difference between the accommodation at an inn and those on a sleeping-car, except that the latter are necessarily on a smaller scale than at an inn. In both cases, the porter meets the traveler at the door, and takes whatever portable articles he may have with him. He waits upon him and the other passengers in the car so long as they remain therein. The traveler is not required to sit in his seat during the day, but may, if he so desires, go forward into the other cars on the train, and at stations may go out on the platform. A passenger in a sleeping-car need not avail himself of these privileges, but the fact that he may do so, and that many persons actually do avail themselves of the same, is well known to every traveler and to the company, and is a circumstance in the case. If it is said that it would be unjust to hold the company to the same liability as an innkeeper, because thieves

might take one or more berths in a car, and at the first opportunity leave the car, carrying what articles they could steal before leaving, the same is true of an innkeeper. Thieves, in the garb of respectable people, may take rooms at an inn, and afterwards steal what they can, and escape, yet no one would contend that the innkeeper would not be responsible for the property so stolen, and this, whether it is stolen at night or in the day-time; yet in many of the large inns of this country, at least, there are numerous doors for ingress and egress, while in a sleeping-car there are but two. Were meals served on a sleeping-car, no one would contend that it differed from an inn in its accommodations. In this State, meals are furnished on the through trains, and a passenger need not leave the train from the time of entering it until he reaches the end of the line. This, however, does not appear to have been the case on the railway in question. But the fact that meals are taken at designated stations on the line of the road, instead of on the train itself, does not change the character of the service rendered. So far as such services are rendered, they are the same in kind as those furnished by an innkeeper; and the security of travelers, and as a means of protecting them, not only against the negligence but also against the dishonest practices, of the agents or employes of the sleeping-car company, requires that the company, so far as it renders service as an innkeeper, shall be subject to like liabilities and obligations.

The judgment is therefore affirmed. The other judges concur.

The decision in the principal case, by which a sleeping car company is made liable, as an innkeeper, for the goods of a traveler or passenger, stands alone among the many authorities to be found upon the question of the liability of these companies, all the previous cases having shown that sleeping cars are not inns, nor their owners innkeepers.

Such being the case, it is proposed in this annotation to show what an

inn is, and who is an innkeeper; the differences that exist between the keeper of a common inn and the owner of one of these companies; also, to consider whether such companies can properly be subjected to the stringent liabilities attaching to innkeepers, or whether they are not to be considered in the light of ordinary bailees for hire, and therefore liable for ordinary negligence, in not keeping a reasonable watch over the passenger, and his personal belongings,

while he is asleep; and further, to examine the question of liability of steam-boat owners as innkeepers.

An Inn, as defined by BAYLEY, J., in *Thompson v. Lacy* (1820), 3 Barn. & Ald. 286, is a "house where the traveler is furnished with everything he has occasion for while on his way," and by BEST, J., in the same case, as, "a house, the holder of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received."

In *Wintermute v. Clarke* (1851), 5 Sandf. (N. Y.) 247, OAKLEY, C. J., said it was "a public house of entertainment for all who chose to visit it, which is the true definition of an inn."

Chancellor KENT, in his Commentaries (Vol. II, p. 595), defines it thus: "It must be a house kept open publicly for the lodging and entertainment of travelers in general, for a reasonable compensation." "If a person," the same learned writer goes on to say, "lets lodgings only, and upon a previous contract with every person who comes, and does not afford entertainment for the public at large indiscriminately, it is not a common inn."

The various definitions are thus treated by the Court in *Bonner v. Welburn* (1849), 7 Ga. 307: "The leading ideas which pervade them all, are, that inns are houses for the entertainment of all travelers. * * For the entertainment of all travelers, at all times and seasons, who may properly apply, and behave with decency; and that as guests for a brief period, and not as lodgers or boarders, by contract, by a season."

Mr. Justice STORY, in his work on Bailments (§ 475), thus defines an innkeeper: "The keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses

and attendants, for a reasonable compensation."

In *Kisten v. Hilderbrand* (1848), 9 B. Mon. (Ky.) 72, Chief Justice MARSHALL defined an innkeeper as, "a person who makes it his business to entertain travelers and passengers, and provide lodging and entertainment for them, their horses and attendants"; and further; after stating that they are liable as such although they have no provision for horses; says: "It must be his business to entertain travelers and passengers." See to the same effect *Southwood v. Myers* (1868), 3 Bush. (Ky.) 681.

The case of *Bonner v. Welburn*, (*supra*), went so far as to hold that, a hotel at a watering place, where there was a medical spring, open during the summer and fall for the accommodation of visitors resorting thither for their health or pleasure, was not an inn or house of entertainment, but was in the nature of a boarding-house.

From the above it is clear that, in order to render a person liable as an innkeeper, he must keep a common inn, for the lodging and entertainment of the public generally and indiscriminately; and that, he must make such his business. This view is further supported by *Lyon v. Smith* (1843), 1 Morris (Iowa) 184, in which case MASON, C. J., said: "To be subject to the same responsibilities attaching to innkeepers, a person must make tavern keeping, to some extent, a regular business, a means of livelihood. He should hold himself out to the world as an innkeeper. It is not necessary that he should have a sign, * * * provided he has in any other manner authorized the general understanding that his was a public house, where strangers had a right to require accommodation." And further, by *Carter v. Hobbs* (1863), 12 Mich., 56, where it is distinctly laid down that the party must act in the capacity of an

innkeeper, that the relationship of innkeeper and guest must exist; in short, he must keep an inn. To the same effect, *Hosoth v. Franklin* (1858), 20 Tenn. 798; *Inglisbee v. Wood* (1862), 36 Barb. (N. Y.) 462; *Walling v. Potter* (1868), 35 Conn. 183; S. C. 9 AMER. LAW REGISTER 618. See also *Carpenter v. Taylor* (1856), 1 Hilt. (N. Y.) 193; where the Court held that, in order to charge a party as an "innkeeper," the premises must be kept as an inn for the accommodation of travelers. The opinion of the Court in *Cromwell v. Stephens* (1867), 2 Daly (N. Y.) 15, further shows that, in order to render a person liable as an innkeeper, meals must be furnished. In this case DALY, P. J., says: "A mere lodging house, in which no provision is made for supplying lodgers with their meals, wants one of the essential requisites of an inn."

The duties cast upon an innkeeper are such, that, in pursuing his daily business he is bound, not only to lodge, but also, to feed his guest, and to receive and care for his goods; and further, unless otherwise provided by statute, his liability is unrestricted in amount; so he cannot select his guests, but is bound to lodge and entertain all who apply in a proper manner, in return for which he has a lien upon the property of the guest for his charges. Moreover, an innkeeper is an insurer of the safety of his guest's goods: *Mason v. Thompson* (1830), 9 Pick. (Mass.) 283; *Berkshire Woolen Co. v. Proctor* (1851), 7 Cush. (Mass.) 417; *Dunbar v. Day* (1882), 12 Neb. 597; in which case it was said that, it seems to be the fair result of all the cases, that the innkeeper is responsible for all the property of every kind which the traveler finds it convenient to have about him as a traveler.

Now all these duties cannot fairly be said to attach to a sleeping-car company, and especially to such, as the one in

the principal case, where there was no provision made to feed the passengers on board, although if such provision were made it might more reasonably be urged that such companies were liable as innkeepers. Yet in the opinion, MAXWELL, J., says, "Except in the matter of furnishing meals, there seems to be no essential difference between the accommodation at an inn and those on a sleeping car, except that the latter are necessarily on a smaller scale than at an inn." It is however manifest, that there are very material differences between the two, for a person occupying a berth in a sleeping car cannot protect his person and goods by bolt and lock from the thief; and these distinctions are perhaps nowhere better shown, than by BROWN, J., in *Blum v. Southern Pullman Palace Car Co.* (1876), 1 Flipp. (U. S. Cir. Rp., W. D. Tenn.) 500, wherein it was sought to hold the defendants liable as innkeepers for money stolen from out of the passenger's waistcoat pocket which he had placed under his pillow on retiring for the night. Holding the company not liable as innkeepers the learned judge said: "There are good reasons for not extending such liability to the proprietors of a sleeping car. 1st. The peculiar circumstances of sleeping cars are such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth with scarcely a possibility of detection. 2d. As a compensation for his extraordinary liability, the innkeeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping car has even asserted

such lien, and it is presumed that none ever exists. The fact that he is paid in advance does not weaken the argument, as innkeepers are also entitled to prepayment. 3d. The innkeeper is obliged to receive every guest who applies for entertainment. The sleeping car receives only first class passengers traveling upon that particular road, and it has not yet been decided that it is bound to receive them. 4th. The innkeeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guest, and unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping car furnishes a bed only, and that too usually for a single night. It furnishes no food, and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging. 5th. The conveniences of a public inn are an imperative necessity to the traveler, who must otherwise depend upon private hospitality for his accommodation, notoriously an uncertain reliance. The traveler by rail is however under no obligation to take a sleeping car. The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose. 6th. The innkeeper may exclude from his house every one but his own servants and guests. The sleeping car is obliged to admit the employees of the train to collect fares and control its movements. 7th. The sleeping car can not even protect its guests, for the conductor of the train has a right to put them off for non-payment of fare, or violation of the rules and regulations."

Again, the distinctions are further shown in *Welch v. The Pullman Palace Car Company* (1874), 1 Sheld. (N. Y.) 457, where the company was held not liable as an innkeeper; SHELDEN, J., said, "The liability of an innkeeper arises out of facts which do not arise in

this case. He cannot lawfully refuse to receive guests to the extent of his reasonable accommodation, nor can he impose unreasonable terms upon them. The necessities of the traveler require these just rules to be adopted. As a compensation for the responsibility thus incurred, he has a lien upon all the property of the guest in the inn for all his expenses there. * * The defendant could not be compelled to receive and entertain passengers, however amenable it might be upon its contract with the carrier, and it had no lien for the price of the accommodations."

So in the case of *Pullman Palace Car Co. v. Smith* (1874), 73 Ill. 360; S. C. 15 AMERICAN LAW REGISTER 95, where it appeared that the company had no place to store valuables, and that their agents were instructed to receive no parcels, valuables or money, and receive no pay for baggage or valuables of any kind, but only to take pay for the berths, and had a notice on their ticket, placing all at the owner's risk; on an action being brought by the passenger to recover a large sum of money which had been stolen, while he was asleep, from out of his inside vest pocket, which he had placed under his pillow previous to retiring for the night, the Court held that the company was not liable as an innkeeper. SHELDEN, J., in delivering the opinion of the Court, (after citing various authorities upon the nature of inns and innkeepers) added, "From the authorities already cited, it is manifest that this Pullman Car falls quite short of filling the character of a common inn, and the Pullman Palace Car Company that of an innkeeper. It does not, like an innkeeper, undertake to accommodate the boarding public, indiscriminately, with lodging and entertainment. It only undertakes to accommodate a certain class, those who have already paid their fare, and are provided with

a first class ticket entitling them to ride to a particular place. * * The not furnishing entertainment is a lack of one of the features of an inn. * *

The custody of the goods of the traveler is not, as in the case of an innkeeper, accessory to the principal contract to feed, lodge and accommodate the guest for a suitable reward, because no such contract is made. The same necessity does not exist here as in the case of a common inn. At the time when this custom of an innkeeper's liability had origin, wherever the end of the day's journey of the wayfaring man brought him, there he was obliged to stop for the night, and entrust his goods and baggage into the custody of the innkeeper. But here the traveler was not compelled to accept the additional comfort of a sleeping car; he might have remained in the ordinary car, and there were easy methods, within his reach, by which both money and baggage could be safely transported, and there was no necessity of imposing this duty and liability on appellant [the company]. * * The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied there is no precedent or principle, for the imposition of such a liability upon appellant."

These cases show, most lucidly, the points of distinction between the two classes of persons, and the principles, therein set forth, pervade all the other decisions upon the subject, except the one in the principal case. It does appear somewhat singular, that none of the cases were either called to the attention of the Court, or cited by the judge in his opinion. That such is the case, however, one is led to presume from the opinion, wherein MAXWELL, J., says, "We find no case exactly in point, and as the question is a new one, not only in this State but to a great ex-

tent, in the other States of the nation, we are practically without precedents to aid us, and must adopt such rules as may seem just and equitable."

There would seem however to be ample authority to show that such is not the case, and, that the weight of such authority is decidedly in favor of holding them liable, as ordinary bailees for hire (for negligence, in not exercising ordinary care, and keeping proper watch over the passenger and his personal belongings while he is asleep), and not as innkeepers.

Against this theory, however, the remarks of SHELDEN, J., in *Pullman Palace Car Co. v. Smith*, (*supra*), may perhaps be urged, inasmuch as, after dealing with the question from the innkeeper's stand-point, as before shown, he would seem to be of opinion that they could not be held liable in any way, for he says, "It would be unreasonable to make the company responsible for the loss of money which was never intrusted to its custody at all, of which it had no information, and which the owner had concealed upon his own person. The exposure to the hazard of liability for losses by collusion, for pretended claims of loss where there would be no means of disproof, would make the responsibility claimed a fearful one. Appellee [the passenger], assumed the exclusive custody of his money, adopted his own means for its safe keeping, by himself, and, we think his must be the responsibility of its loss."

It does not seem just or right that such companies should be held responsible for whatever amount persons, knowing the situation in which they are placed, may choose to carry about their persons, whether for their own convenience or otherwise, without regard to the reasonableness or unreasonableness of the amount. Yet it is reasonable that they should be held responsible for

negligence in not keeping sufficient watch, and exercising ordinary care in guarding his person, and such property as the passenger may reasonably carry with him. This view the authorities support.

The main object in providing such cars is surely to permit the passenger to sleep, thereby inducing him to depart from the ordinary car, provided by the railroad company, wherein if he sleeps, he does so at his own risk, and to partake of the ease and comfort afforded him by a berth in one of their own cars where he is invited to sleep, and not only to sleep but to disrobe in order that he may make himself so far as possible as comfortable as he would be at home. Thus, it cannot be said that, while in this state, they expect him to look after his own person and property. They receive compensation for the privilege of sleeping, and therefore impliedly undertake to keep watch, and use ordinary care in respect to his person and property.

This view is supported by the case of *Palmer v. Wagner* (1875), decided in the Marine Court of New York, but only reported in 11 Alb. L. J. 149, where the Court held that, while such companies were not insurers, innkeepers nor transporters, yet they were bound to use due diligence in keeping away disturbers, and must keep reasonable watch to protect a passenger, and his property about his person, during sleep.

Again, by *Pullman Palace Car Co. v. Gaylord* (1884), 6 Ky. Repr. 279; s. c. 23 AMERICAN LAW REGISTER (N. S.) 788, where the action was brought to recover the value of a scarf-pin stolen from a passenger in one of the company's cars, the company being held liable for a breach of duty in not keeping a reasonable watch over the passenger and his property, RICHARDS, J., remarked—"While * * * the stringent liability of an innkeeper which the dis-

tinguished Chief Justice COLERIDGE has said does not 'stand on mere reason, but on custom, growing out of a state of society no longer existing,' is not to be applied to the owners of sleeping cars, it does not follow that they assume no duties or liabilities. These cars are in themselves an invitation to the traveling public to enter and protect themselves against the weariness of a long journey by disrobing and sleeping. The passenger in buying and the company in selling the ticket contemplate that this privilege will be improved. The company accepting compensation under these circumstances impliedly undertakes to keep a reasonable watch over the passenger and his property. The faithful performance of this undertaking is the limit of its duty in this respect. Its breach must be the foundation of every action seeking to charge the company with the loss of articles the passenger has with him upon the car."

The case of *Lewis v. New York Central Sleeping Car Company* (1887), 143 Mass. 267; s. c. 26 AMERICAN LAW REGISTER (N. S.) 359, further illustrates the above principles. In that case, there were two actions, one in contract alleging that the company, in consideration of the purchase of the ticket entitling the passenger to be carried in a sleeping car, undertook to provide him with a berth in such car, and to see that such car was properly guarded, and that his personal baggage and effects were protected while he was asleep, but that through the negligence of their agents certain monies were stolen. The other action was in tort, and alleged the same, and claimed damages. In delivering the opinion of the Court, which held the company liable as for a breach of duty, that is, for negligence, MORTON, C. J., said, "A sleeping car company holds itself out to the world as furnishing safe and

comfortable cars; and when it sells a ticket it impliedly stipulates to do so. It invites passengers to pay for, and make use of, its cars for sleeping; all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself, or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any other step to protect himself in a sleeping car, but, by the necessity of the case, is dependent upon the owners and officers of the car, to guard him and the property he has with him from danger from thieves or otherwise. The law implies the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy and by the true interests of both the passenger and the company; and the decided weight of authority supports it."

The case of *Pullman Car Company v. Gardner* (1883), 3 Penny. (Pa.) 78, while conceding that the company was not liable as an innkeeper, clearly shows that "a reasonable and proper degree of care is imposed on the company," for the Court said, "The main object in taking passage in such a car is to permit the passenger to sleep." The Court almost made it an imperative duty for such companies to keep a watchman in the car, saying, "Unless a watchman be kept constantly in view of the centre aisle of the car, larceny from a sleeping passenger may be committed without the thief being detected in the act."

The case of *Dargau v. Pullman Palace Car Co.* (1885), 2 Willson

(Texas Ct. App. Civil Cas.,) 607, takes the law as well settled that sleeping car companies are not to be regarded as innkeepers, nor subjected to their onerous liabilities in respect of the property of those enjoying their accommodation, and holds that, "it is their duty to exercise ordinary care for the security of passengers' valuables," and that a failure to use ordinary care, proportionate to the danger reasonably to be apprehended, would be negligence which would reasonably render such a company liable for the loss of the passenger's property (per WILLSON, J.). Pointing out that greater danger exists at night, while the passenger is asleep, than in the day time, when he is awake and can care for himself, the Court dwells upon the invitation to sleep, and the implied agreement to take reasonable care of the guest's effects while he is asleep.

Again, in *Root v. New York Central Sleeping Car Co.* (1887), 28 Mo. App. 199, THOMPSON, J., says, "The settled law is, that a sleeping car company is not an insurer of the baggage of a passenger, but that its liability, at most, is that of a bailee for hire. In the case of a loss of the passenger's baggage or belongings, it is therefore, liable, if at all, only on the ground of negligence, and in order to be so liable, it must have been negligent in the performance of some duty which it assumed to perform for the passenger. That duty, so far as adjudged cases seem to have gone, is, that it will maintain in the car reasonable watch during the night, while the passenger is asleep." He even goes further than this and says, "that the duty of keeping watch does not terminate with the period during which the passenger is actually asleep, but that it extends to keeping a reasonable watch over such of the necessary baggage and belongings as he cannot conveniently take

with him nor watch himself while he is absent from his berth in the wash-room, preparing his toilet after arising in the morning." And further, that such duty extended to "the extent of baggage reasonably necessary." See to the same effect *Wilson v. Baltimore & Ohio Ry. Co.* (1888), 32 Mo. App. 682.

The case of *Scaling v. Pullman Palace Car Co.* (1886), 24 Mo. App. 29, further supports this view, LEWIS, P. J., saying, "The gist of the action is negligence. * * * Sleeping car companies are not liable to the responsibilities of common carriers, or of innkeepers. But there is a peculiar responsibility implied in every contract of the company with a passenger." *Bevis v. Baltimore & Ohio Ry. Co.* (1887), 26 Mo. App. 19, in which the Court said, "there must be reasonable care in keeping watch while the plaintiff slept," further supports these views.

In *Woodruff Sleeping Car and Parlor Coach Co. v. Diehl* (1882), 84 Ind. 474, the Court held that the company was not liable either as an innkeeper, or as a common carrier, but was liable for negligence, HOWK, J., saying, "While it may be true that a sleeping car company is not liable as an innkeeper or a common carrier, yet it cannot be held that the company is not responsible to an occupant of a berth in its car for the loss of his personal goods and money, resulting from such negligence, as was shown by the facts in this case." And further, after quoting the language used in *Crosier v. Boston etc., Steamboat Co.* (*infra*), as follows: "In such a case, the passenger is invited, upon the payment of a consideration, to disrobe himself and retire to a couch to sleep; in other words, he is invited to throw aside all the vigilance and precaution which men habitually practice when awake,

and to entrust his person and whatever men usually carry about their persons, to the care and vigilance which, it must be presumed, they who extend the invitation and receive the reward for the comfort thus afforded, will themselves exercise. Certainly few persons would dare trust themselves to sleep in a state-room on board a steamboat unless they supposed those in charge of it were under an obligation to exercise the utmost vigilance," added, "this language it seems to us, is as applicable to the occupant of a berth in a sleeping car as to the occupant of a state-room on a steamboat."

The case of *Pfaff v. The Pullman Palace Car Co.* (1877), 4 W. N. C. (Pa.) 240, further shows that the gist of the action is negligence, and although the company was not in this instance sought to be made liable as an innkeeper, but as a common carrier, it is here cited to support the contention that they can only be made liable as ordinary bailees for hire. In this case the plaintiff had two valises, which on entering the car were taken from him by the porter; plaintiff left the car for a few moments, and on returning found one was missing. He sued the company as common carrier, but the Court held it was not liable as such, and that in order to recover, negligence must be shown. To the same effect, *Whitney v. Pullman Palace Car Co.* (1887), 143 Mass. 243. The case of *Pullman Palace Car Co. v. Pollock* (1887), 69 Tex. 120, further supports the contention, that they are not liable as common innkeepers, the Court saying, "It is evidently true it [the company] did not assume * * * the liabilities which the innkeeper assumes to guests."

The recent case of *Pullman Palace Car Co. v. Matthews*, decided in the Supreme Court of Texas, November 1, 1889, further supports the cases of *Pullman Palace Car Co. v. Pollock* and

Lewis v. New York Central Sleeping Car Co., supra.

So far, the cases, to which attention has been drawn, have related solely to actions brought against sleeping car companies strictly so called, but inasmuch as the question, whether or not the liability of an innkeeper attaches to the owner of a steamboat, is so closely connected with the subject that an examination of the cases upon this side of the question seems necessary.

There would seem to be more reason for holding the owner of a steamboat to the responsibilities of an innkeeper than in holding a sleeping-car company, purely so called, thereto. In a steamboat, a person occupying a state-room, has the means of protecting himself by lock and bolt against the thief; and a cloak room is provided; he is also furnished with meat and drink upon the premises, in the same manner as at an inn. Yet here, the courts have differed in their opinions.

In the case of *Steamboat Crystal Palace v. Vanderpool* (1855), 16 B. Mon. (Ky.) 302, a case in which a theft had been committed, of articles from the passenger's state-room in the night, CRENSHAW, J., says, "Steamboats are, in some respects, analogous to inns, and it would greatly promote the ease, comfort, and safety of the traveling community if their owners were held responsible to the same extent that innkeepers are; but, so far as we know, they have never been held accountable upon the principles applied to innkeepers." He regarded them however as common carriers and held them not liable, as the articles were not entrusted to their safe keeping.

In *Macklin v. New Jersey Steamboat Co.* (1869), 7 Abb. Pr. (N. Y.) 229; S. C. 9 AMERICAN LAW REGISTER 239, which was also a case of theft, DAILY, J., applied the law upon the question of the liability of innkeepers to the case of

a steamboat, "in which the traveler is carried, lodged and fed," and may "with some liberty of speech, be called a traveling inn." Here again the Court found the defendants liable as common carriers of passengers.

Crozier v. The Boston, New York and Newport Steamboat Co. (1871), 43 How. Pr., (N. Y.) 466, was also a case of larceny of articles from the plaintiff's stateroom in the night, although he had taken the precaution to lock the door before retiring. In this case CARTER, J. C., as referee says, "I perceive in it all the elements of that form of liability which, under the circumstances analogous, attaches to an innkeeper. The rule of law applicable to such a case, I think to be this,—that if any of the articles or money which the passenger properly has with him in the state-room are stolen, the presumption is, that the theft was in consequence of the default of the carrier and that this presumption can be rebutted only by proof that the loss was attributable to the negligence or fraud of the passenger, or to the act of God, or of the public enemy. All the considerations of public policy, which have operated to fix upon innkeepers the rigorous liability above indicated, apply, as it seems to me, with increased force to the case of carriers of passengers under these circumstances."

Thus the cases above cited apply the strict rules of law relative to innkeepers, to the owners of steamboats, while, in the following the contrary opinion is held.

In *Clark v. Burns* (1875), 118 Mass. 275, defendants were sued, for the value of a watch stolen from plaintiff's state-room, as common carriers, with counts charging them with negligence and charging them as innkeepers. Here GRAY, C. J., said: "The liability of an innkeeper extends

only to goods put in his house as keeper of a public house, and does not attach to a carrier who has no house, and is engaged only in the business of transportation. The defendants carrying passengers and goods for hire, were not innkeepers." He further held that in order to enable plaintiff to recover, negligence must be proved.

The view taken in this case is supported by the case of *American Steamboat Co. v. Bryan* (1887), 3 W. N. C. (Pa.) 528, where it was held that they could not be held as innkeepers; negligence must be proved.

These last two cases are supported by the opinion of RICHARDS, J., in *Pullman Palace Car Co. v. Gaylord* (*supra*), wherein, in speaking of a sleeping car, he says: "It could no more be said that a sleeping car was an 'inn on wheels' than that a steamboat was an 'inn on water.'"

The fact, that such personal belongings of the traveler as he may reasonably carry with him are lost in, or stolen from, a sleeping car, does not relieve the railroad company from responsibility therefor. This was decided by the case of *Kinsley v. Lake Shore and Michigan Southern R. R. Co.* (1878), 125 Mass. 54, where the plaintiff, a traveler on the defendant's road, occupied a berth in a sleeping car owned by another company. On stopping at a depot for the purpose of taking dinner, plaintiff asked an employe whether his baggage would be safe if left in such car, and on being informed that it would, left it, and went to dinner. On his return he found the car had been taken off the train, and was told he would find his baggage in another car on the train. Boarding such car, he found some portion missing, and brought an action against the railroad company. In the opinion of the Court, GRAY, C. J., says: "The fact that the car was not

owned by the defendant, but was used on its road under a contract with other parties who furnish conductors and servants to take charge of such car, there being no evidence that the plaintiff knew of that contract, or had any notice that the car was not owned by the defendant and under its exclusive control, could not affect the measure of the defendant's liability to the plaintiff." The same result was reached in the case of *Pennsylvania Co. v. Roy* (1880), 102 U. S. 452, where personal injuries were received by the plaintiff, riding in a sleeping car, through the falling of a berth. Holding the railroad company liable, HARLAN, J., remarks, "The law will not permit a railroad company, engaged in the business of carrying people for hire, through any device or arrangement with a sleeping car company whose cars are used by, and constitute a part of the train of the railroad, to throw off the duty of providing proper means for the safe conveyance of those whom it has agreed to carry." See to the same effect, *Louisville, Nashville & Great Southern R. R. Co. v. Katsenberger* (1886), 16 Tenn. 380.

Reference may here be made to the annotation to the cases of *Walling v. Potter* (1868), 9 AMER. LAW REG. 618; *Pullman Palace Car v. Smith* (1874), 15 Id. 95; and *Lewis v. New York Central Sleeping Car Co.* (1887), 26 Id. 359, as further supporting the view here taken.

This annotation has, as far as possible, been confined to the question of holding sleeping car companies liable as innkeepers, and has not touched, or if so, very slightly, upon the question of their liability as common carriers of passengers, inasmuch as that question did not arise, nor was it even mooted in the principal case.

ERNEST WATTS.

ABSTRACTS OF RECENT DECISIONS.

BAILMENTS.

Deposit of grain for storage is a bailment, the title remaining in the depositor so that he is deemed to be the owner of grain in the warehouse to the amount of his deposit, although the identical grain he deposited has been removed, and other grain, of like kind and quality, substituted in its stead. *Hall v. Pillsbury*, S. Ct. Minn., Feb. 18, 1890.

BANKS AND BANKING.

Depository of taxes collected to satisfy county bonds issued in aid of a railroad company, which depository has been duly selected, cannot be held responsible, on the ground that an excess of bonds has been issued, for money which it pays out by order of the committee having charge of the fund, in the absence of any fraud or collusion between the bank and the committee, and the facts that the president of the bank was also president of the railroad company, and that one of the committee was cashier of the bank and secretary of the railroad company, do not impose upon the bank the duty of knowing which of the bonds are valid and which invalid. *Deposit Bank of Owensboro v. Daviess County Court*, Ct. App. Ky., Jan. 16, 1890.

Depositor drew his own check upon a bank and deposited it with another bank where he also had an account; the latter, instead of collecting the check, exchanged it for a bank-draft, which was not paid, and then notified the depositor that the draft was held subject to his order; the latter, with knowledge of all the facts, directed the bank to hold the draft a few days and then send it to him; the depositor's action amounted to a condonation of the bank's negligence and released it from liability for not collecting the check. *Hazlett v. Commercial Nat. Bank*, S. Ct. Pa., Feb. 3, 1890.

BILLS AND NOTES.

Indorsement is constituted by the payee writing upon the back of a promissory note, "For value received, I hereby guaranty payment of the within note, and waive demand and notice on the same when due," and signing the same. *Helmer v. Commercial Bank*, S. Ct. Neb., Jan. 7, 1890; *Weitz v. Wolfe*, S. Ct. Neb., Jan. 14, 1890.

President of corporation indorsed a promissory note or discount in the name of the corporation; he had no direct authority to do so, but the corporation was without working capital, which could be gotten only by borrowing, and the president conducted all of its business, paid its expenses and had for a number of years been accustomed to procure discounts for its benefit, with the knowledge of the directors, by indorsing in its name; a finding by a jury that the president had authority to bind the corporation by such an indorsement, would be sustained. *Fifth Nat. Bank of Providence v. Narrassa Phosphate Co.*, Ct. App. N. Y., Feb. 25, 1890.

Time of payment, as fixed by a promissory note, may be controlled by a separate written agreement, made and entered into by the parties at the time of the execution of the note. *Jacobs v. Mitchell*, S. Ct. Ohio, Dec. 3, 1889.

CHATTEL MORTGAGES.

Retention of possession by a mortgagor of a stock of goods, with the understanding that he shall continue to sell them at retail in the ordinary course of trade, is fraudulent and void as to creditors of the mortgagor attaching the goods while in the hands of the latter. *Huschle v. Morris*, S. Ct. Ill., Jan. 21, 1890.

COMMON CARRIERS.

Fire clause in a bill of lading, which exempts from liability for loss by fire, a railroad company which has made no reduction in its freight rates in consideration of such clause, is not a valid limitation of the carrier's common law liability, and will not be enforced, and where the carrier has given its customers no choice as to whether they would ship with or without the fire clause, the acquiescence of the shipping public in the form of a bill of lading which contains such clause, does not establish the reasonableness of the exemption. *Louisville & N. R. R. Co. v. Gilbert*, S. Ct. Tenn., Jan. 30, 1890.

Limitation of liability of a railroad company to a shipper to a certain specified amount, in case of loss or damage arising through the negligence of the company, in consideration of a reduced rate of transportation, is valid, though the property is worth much more than that amount and though it is provided by statute that any agreement to exempt the company from liability occasioned by its own neglect, shall be invalid. *Richmond & D. R. R. Co. v. Payne*, S. Ct. App. Va., Jan. 30, 1890.

CONSTITUTIONAL LAW.

Appointment of municipal officers, under an act authorizing the mayors of all the cities in the State to make such appointments, the act to take effect only in such cities as shall accept it at a popular election, is not unconstitutional; such act is not special or local legislation. *In re Cleveland, Mayor of Jersey City*, Ct. Err. and App. N. J., Feb. 6, 1890.

Decree of State Court restraining citizens of that State from prosecuting attachment suits begun in another State, and brought therein in order to evade the laws of the first State, is not in violation of the constitutional provisions that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," or that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." *Cole v. Cunningham*, S. Ct. U. S., Jan. 20, 1890.

DEBTOR AND CREDITOR.

Acceptance of note of a third party for a pre-existing debt, and the surrender of the original notes which represented such debt,

followed by suit and recovery of judgment upon the new note, will estop the creditor from pursuing the original debtor. *Dick v. Flanagan*, S. Ct. Ind., Feb. 25, 1890.

EASEMENTS.

Stairway, leading from the street to the second story of a three-story building, erected upon a corner lot, and covering the whole of it, was constructed in the corner room of the first story ; at the landing of the stairway, and connected with it, a hall was made, extending over the room next to the corner room and connecting, with the room over the next adjoining room ; the rooms in the second story were intended for offices, and, to adapt them for such use doors were made opening into this hall ; another stairway was also put in, running from the hall to the third story ; the stairway leading from the street to the second story was the only means of access to the hall above and to the rooms opening into it, and its use was necessary to their proper enjoyment ; while the premises were in this condition, the owner sold and conveyed a part thereof, described by metes and bounds, which included the hall connected with the landing of the stairway leading from the street, and the office rooms on the second floor opening into the hall, and the purchaser, with the knowledge of his vendor, who retained the corner room in which was the stairway, immediately entered upon and continued the use of such stairway as his only means of access to the hall and connecting rooms purchased on him : a right to the use of the stairway passed by the conveyance to the purchaser as an easement appurtenant to the premises conveyed. *Nat. Exchange Bank v. Cunningham*, S. Ct. Ohio, Nov. 19, 1889.

FIRE INSURANCE.

Delivery by agent, who has been informed by the assured that the building covered is on leased land, of a policy in which this fact is not noted in writing, amounts, in the absence of collusion, to a waiver of the condition requiring it to be so noted, although the policy provides that, "the use of general terms, or anything less than a distinct agreement indorsed on the policy, shall not be construed as a waiver of any restriction therein." *Home Ins. Co. v. Stone River Nat. Bank*, S. Ct. Tenn., Jan. 14, 1890.

Mortgage placed upon the insured property is of itself an increase of the risk and a decrease of the security of the insurer, since it lessens the interest of the insured in the property, even though no right of action has accrued upon such mortgage, which is given to secure a surety on a debt not yet due. *Lee v. Agricultural Ins. Co.*, S. Ct. Iowa, Feb. 6, 1890.

Transfer of property, covered by a policy of fire insurance, in a mutual company, the policy-holder retaining an insurable interest in the property, will not prevent recovery for a subsequent loss, although a by-law of the company provides that "policies of insurance may be assigned with the consent of the president and secretary, the parties paying fifty cents recording fees, at the same time giving his undertaking to the company, and the company

will not hold itself responsible for loss on property so transferred until such assignment so made and undertaking given." *Jerdee v. Cottage Grove Fire Ins. Co.*, S. Ct. Wis., Jan. 7, 1889.

FIXTURES.

Mortgagee of real estate, in order to establish a claim to chattels as fixtures, must show, (1) that the chattels were actually annexed to the realty, or something appurtenant thereto; (2) that they were applied to the use or purpose to which that part of the realty with which they were connected was appropriated; and (3) that the person who annexed them intended to make them a permanent accession to the freehold. *Speiden v. Parker*, Ct. Err. and App. N. J., Feb. 6, 1890.

Railroad cars, used in a quarry, are not fixtures. *Id.*

GIFTS.

Bill of sale of life insurance policy, made out to the niece of the insured, who was seventy years of age and had suffered two strokes of paralysis, and given by him to his attorney with the direction to give it to the niece in case of the insured's death, which soon occurred, from a third stroke, was not a valid gift *inter vivos*, as the donor had not relinquished control of his property, but will be sustained as a gift *causa mortis*. *Williams v. Guile*, Ct. App. N. Y., Nov. 26, 1889.

Deposit in savings bank by a father of money to the credit of his infant son, who died sixteen years after attaining his majority, without knowledge of the deposit, the father retaining possession of the deposit-book and on one occasion drawing from the account and receipting in his own name, does not constitute a gift, as the facts show no intent to give and there was no delivery. *Beaver v. Beaver*, Ct. App. N. Y., Nov. 26, 1889.

JURISDICTION.

Supreme Court of the United States has no jurisdiction to review the decision of a State Court that a party was not liable in damages for the reason that he was acting, in the matters complained of, within the scope of judicial authority conferred upon him by Act of Congress. *Manning v. French*, S. Ct. U. S., Jan. 27, 1890.

LIFE INSURANCE.

Beneficiary named in the certificate of a mutual benefit society has no vested interest in such certificate until the death of the insured member, and the insured may change his designation of the beneficiary at will and against the latter's consent, provided that he makes such change in the manner pointed out by the policy and by-laws of the society; but there are three exceptions to this rule: (1) If the society has waived a strict compliance with its own rules, and in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regula-

tions was not pursued; (2) If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made; and (3) If the assured has followed the course indicated by the regulations, and has done all in his power to change the beneficiary, but dies before the new certificate is actually issued, a court of equity will treat such certificate as having been issued. *Supreme Conclave, Royal Adelpia v. Cappella*, U. S. C. Ct., E. D. Mich., Jan. 20, 1890.

LIMITATION.

Culvert under a railroad embankment, which injures adjoining land by discharging water on it, is a continuing nuisance, and an action of damages for maintaining such nuisance is not barred by the lapse of the statutory period of limitation since the completion of the structure. *Wells v. New Haven & N. Co.*, S. Jud. Ct., Mass., Feb. 25, 1890.

LIQUOR LAWS.

Purchase for minor of intoxicating liquor by a by-stander with the minor's money, such purchase being made at the suggestion of the liquor-seller, is in effect the same as if the sale had been made directly to the minor. *Lilas v. State*, S. Ct. Ala., Jan. 16, 1890.

MASTER AND SERVANT.

Board of Commissioners, incorporated as a municipal agency to furnish a city with water, and not having power to levy taxes indefinitely, but only an equitable water-rate, is not liable for injuries received from the negligence of its servants. *O'Leary v. Board of Fire and Water Commissioners*, S. Ct. Mich., Jan. 24, 1890.

Negligence of foreman, who is ordered to remove a barge from the water without directions as to the means to be used, and who selects unsafe ropes, by the breaking of which a laborer is injured, will render the master liable for the injuries, and such laborer is not a fellow-servant with the foreman. *Lund v. Hersey Lumber Co.*, U. S. C. Ct., D. Minn., Jan. 6, 1890.

Unskilled employe who is selected to run an elevator must be provided by his employer for a reasonable length of time with a competent instructor, and the employer will be liable for any injury to his servant arising from the incompetency or negligence of such instructor. *Brennan v. Gordon*, Ct. App. N. Y., 2d Div., Feb. 25, 1890.

MORTGAGES.

State statute, enacting that certain railroad stock held by the State shall be pledged, together with any dividends that may be declared thereon, to the payment of certain bonds and interest coupons issued by the State, does not create an actual pledge, but, at most, a mortgage, which cannot be enforced, as the State is a necessary party, and cannot be sued. *Christian v. Atlantic & N. C. R. R. Co.*, S. Ct. U. S., Jan. 27, 1890.

NEGLECTENCE.

Contributory negligence is chargeable to one who stands after dark between two tracks of a cable company, which are so near together that cars going in opposite directions would pass within two feet of each other, and there waits for and attempts to board a car coming on one track, without paying any attention to see whether any cars are approaching in dangerous proximity on the other track. *Miller v. St. Paul City Ry. Co.*, S. Ct. Minn., Feb. 7, 1890.

Defective bridge, which has been opened by a municipality for public travel, renders such municipality liable for any damages caused by its defective condition, although the defects were entirely upon one side of the bridge and the other was perfectly safe for travel. *Walker v. City of Kansas*, S. Ct. Mo., Feb. 10, 1890.

Discharge of fire-works from a veranda in front of the second story of a building in the center of a public square, from troughs so arranged that the fire-works would pass over the assembled people, who were there for the purpose of witnessing the display, is not of itself an unlawful act, in the absence of a statute or ordinance making it so, but where it is shown that a large quantity of fire-works was placed on the floor of a narrow veranda and the persons who had charge of the display, smoked cigars during the entire performance, towards the close of which some loose Roman candles on the floor of the veranda were discovered to be on fire and throwing out balls of fire in every direction, which ignited the sky-rockets, thereby causing spectators, to be hit and injured, there is sufficient evidence that the injuries were the result of the negligence of the persons in charge of the fire-works, to sustain a verdict for damages against them. *Dowell v. Guthrie*, S. Ct. Mo., Feb. 10, 1890.

Notice to owner of the dangerous condition of a building is not necessary, in order to charge him with liability for injuries sustained by reason of the falling of such building; he is bound to know the condition of his own property. *Tucker v. Illinois Central R. R. Co.*, S. Ct. La., Jan. 29, 1890.

Skipper of Stock is not guilty of contributory negligence in using the only platform provided by the railroad company for that purpose, although he knows it to be unsafe, if he exercises reasonable care in its use. *White v. Cincinnati, N. O. & T. P. Ry. Co.*, Ct. App. Ky., Jan. 25, 1890.

TELEGRAPHS.

Unfavorable atmospheric conditions do not excuse the dropping out of words in the transmission of a telegraphic message. *Western Union Tel. Co. v. Goodbar*, S. Ct. Miss., Feb. 3, 1890.

JAMES C. SELLERS.

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CHRISTIANITY AND THE COMMON LAW.

In many of the cases that have occupied the courts, involving religious questions, the proposition has been advanced and reasoned from, that Christianity is a part of the common law. It will perhaps be useful briefly to examine the doctrine in its development to discover, if possible, in what sense it may be considered true in those jurisdictions that have not altogether repudiated it.

I. ENGLAND.

The first formal statement of the doctrine was by Sir MATTHEW HALE in *Rex v. Taylor* (27 and 28 Car. 11), 3 Keble 607. The case was an information for blasphemy for saying "Christ is a whoremaster and religion is a cheat * * * Christ is a bastard, and damn all Gods of the Quakers, etc." The Chief Justice, in sustaining the conviction of the blasphemer, is reported to have said :

"These words though of ecclesiastical cognizance, yet that religion is a cheat, tends to dissolution of all government and therefore punishable here, and contumelious reproaches of God or the religion established. * * An indictment lay for saying the Protestant religion was a fiction, for taking away religion, all obligations to God by oaths, etc., ceaseth, and the Christian religion is a part of the law itself, therefore injuries to God are as punishable as to the king or any common person."

The authority for this statement of the Chief Justice seems to have been certain language in Year Book 34 Henry VI., 40, where the judge, PRISOT, says—

"*A tielr leis que ils de Seint Eglise ont en ancien scripture, covient a nous a doner credence; car ceo (est) common ley sur quel tous mans leis sont fondez. Et auxy, Sir, Nous sumus obliges de comestre leur ley de St. Eglise et semblablement ils sont obliges de comestre nostre ley.*"

(Translation.—To such laws as they of the Holy Church have in ancient writings, it is fit that we should recognize as authority, for this is common law or custom, upon which all kinds of laws are founded. * * * We are obliged to recognize their Holy Church law and equally they are under obligation to recognize our law, i. e., the civil law.)

The case was a *quare impedit*, by *Humphrey v. Bohun* against *John Broughton*, Bishop of Lincoln. Commenting on this, Thomas Jefferson writes—

A question was, How far the ecclesiastical law was to be respected in this matter, by the Common Law Court? * * * * Finch mis-states this in the following manner: "To such laws of the Church as have warrant in *holy scripture*, our law giveth credence," and cites the above case, and the words of PRISOT in the margin. Finch's Law, bk. 1, chap. 3, published in 1613. Here we find "ancien scripture" converted into "holy scripture;" whereas it can only mean the antient written laws of the Church. * * * * In truth, the alliance between Church and State in England, has ever made their judges accomplices in the frauds of the clergy; * * * * And thus they incorporate into the English Code, laws made for the Jews alone, and the precepts of the Gospel, intended by their benevolent Author as obligatory only *in foro conscientiarum*; and they arm the whole with the coercions of the municipal law. (Jeff. Rep. App.)

The utterance of Chief Justice Hale in Taylor's case was considered sufficient basis for the doctrine thereafter, and accordingly all the cases in which it was subsequently adopted rely on that judgment as authority. In *Rex v. Hall* (7 Geo. I.) a charge of libel against the doctrine of the Trinity was maintained, and in *Rex v. Woolston* (2 Geo. II.), 2 Str. 834, Sir ROBERT RAYMOND, sitting as Chief Justice of the King's Bench, in an indictment for blasphemous discourses on the miracles of Christ, the Court, citing Taylor's case, declared they would not suffer it to be debated whether to write against Christianity in general was not an offence punishable in the temporal court at law.

King v. Williams (1797), 26 Howell's State Trials 653, was the celebrated case of the indictment of the publisher of Paine's "Age of Reason" for blasphemy in publishing the work. It was tried before Lord KENYON. He charged the jury that Christianity was part of the law of the land. In the opinion of the Court, Mr. Justice ASHHURST, (p. 714,) said:

"All offences of the kind are not only offences to God, but crimes against the law of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together; and it is upon this ground that the Christian religion constitutes part of the law of England."

Sir JAMES MANSFIELD, Chief Justice of the Common Pleas, observed in *Drury v. Defontaine* (1808), 1 Taunt. 130, 135, that it was said by Lord COKE that the Christian religion is part of the common law. The citation from Coke in connection with this statement is 2 Inst. 220, where, in referring to a Saxon law of King Ethelstan, (the latter part of which is, *Die autem dominico nemo mercaturum facito; id quod si quis egerit, et ipsa merce, et triginta praeerea solidis mulctatur;*) Lord COKE observes:

"Here note by the way that no merchandising should be on the Lord's day."

In 1819, in *King v. Carlile*, 3 B. & Al. 161, on an information the same as the indictment in *King v. Williams*, it was declared that, independent of statute, blasphemous libel was an offence at common law. It was said by BEST, Chief Justice, in *King v. Waddington* (1822), 1 B. & C. 26, that denying the truth of the Scriptures maliciously was by the common law a libel, and the legislature could not alter the law whilst the Christian religion was considered to be the basis of that law. This was said in considering an information for blasphemous libel, in stating in a publication that Jesus Christ was an impostor and a murderer in principle. Justice BAYLEY, in *Fennell v. Ridler* (1826), 5 B. & C. 406, a case involving the interpretation of the Sunday Law of England, declared the law was an affirmation of the religion which is the basis of the law of this country. This utterance was approved by BEST, C. J., in *Smith v. Sparrow* (1827), 4 Bing. 84, which case decided that an action would not lie on a contract entered into on Sunday.

Lord ELDON, as appears by *Attorney General v. Pearson* (1817), 3 Merivale 353, and Lord TENTERDEN, before whom *King v. Waddington* was tried, assented to the doctrine. Lord CAMPBELL in his *Lives of the Chief Justices*, Vol. 3, p. 417, takes occasion to comment upon it, and refers to an opinion of Lord MANSFIELD in the House of Lords, in 1780, on the occa-

sion of an appeal from a judgment of the Lord Mayor's court against a dissenter for a statutory penalty, for not being able to take the oath of office after his election as sheriff of London. Lord MANSFIELD, according to his biographer, declared—

"The eternal principles of natural religion are part of the common law; the essential principles of revealed religion are part of the common law; so that any person reviling, subverting or ridiculing them, may be prosecuted at common law."

Lord CAMPBELL adds in a note:

"This, I think, is the true sense of the oft-repeated maxim, that 'Christianity is part and parcel of the common law of England.'"

The fact that all the cases where the maxim was uttered and relied upon, were cases of indictments or informations for blasphemies, would seem to bear out Lord CAMPBELL's limitation, that Christianity is part of the common law of England only in the sense that blasphemy against it is illegal, and punishable independent of statute. On this theory, the case *Cowen v. Milburn* (1867), L. R. 2 Exch. 230, seems to have been decided. The defendant contracted to let rooms to the plaintiff; afterwards, discovering that they were intended to be used for the delivery of lectures maintaining that the character of Christ is defective and his teaching misleading, and that the Bible is no more inspired than any other book, he refused to allow the use of them. The Court held that the publication of such doctrines was blasphemy, and the contract could not be enforced at law.

It remained for the present Lord Chief Justice of England in *Reg. v. Ramsey and Foote* (1883), 48 L. T. (N. S.) 733, to show that all the earlier utterances of the courts in England, to the effect that Christianity was part of the common law, were *dicta*, and if ever actually true, were statements of a law that had been outgrown. He even qualifies the limitation that had been put upon the maxim by Lord MANSFIELD, and in charging the jury (the case was an indictment of the editor and publisher of the "Free Thinker," for certain blasphemous libels therein) told them that it was not a blasphemous libel honestly to deny the truths of the Christian religion, and happily defined such a libel in the generous phrase:

"A wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects."

He said, as to Christianity :

"Gentlemen, you have heard with truth that those things are, according to the old law, if the *dicta* of old judges, *dicta* often necessary for the decisions, are to be taken as of absolute and unqualified authorities, that these things, I say, are undoubtedly blasphemous libel, simply and without more, because they question the truth of Christianity. But I repeat what I said on the former trial that, for reasons which I will presently explain, these *dicta* cannot be taken to be a true statement of the law, as the law is now. It is no longer true, in the sense in which it was true when these *dicta* were uttered, that Christianity is part of the law of the land."

II. UNITED STATES.

In this country, where there is no established church, but where guarantees against an establishment and against religious preferences are found in the Federal Constitution and in every State Constitution, we would not expect to find a general acquiescence in the earlier English view. The cases are numerous where the maxim is broadly asserted upon the authority of the English precedents. In most, if not all, of these cases, however, the utterances are pure *dicta*. Many of them show merely the rhetorical piety of the judiciary. There being, strictly speaking, no common law of the Union, there is no necessity for inquiring as to the interpretation of the maxim as applied to the United States Government. It is significant, however, that almost contemporaneous with the adoption of the Federal Constitution, it was declared by the Senate of the United States that the National Government was not founded on the Christian religion. In the Treaty with Tripoli ratified by the Senate in 1797 (8 U. S. Statutes at Large 155), occurs this article :

"ART. XI. As the Government of the United States of America is not in any sense founded on the Christian religion—as it has in itself no character of enmity against the laws, religion or tranquility of Musselmen—and as the said States have never entered into any war or act of hostility against any Mahometan nation, it is declared by the parties, that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries."

Coming to the State Governments, it will be found that the maxim has been altogether repudiated, as applied to their common law, by the Supreme Courts of Ohio and Louisiana.

In *Bloom v. Richards* (1853), 2 Ohio St. 387, 390, 391, the Supreme Court of Ohio speaking by Chief Justice THURMAN, said :

"Neither Christianity, or any other system of religion, is a part of the law of the State * * * Thus the Statute, upon which the defendant relies, prohibiting common labor on the Sabbath, could not stand for a moment as a law of the State, if its sole foundation was the Christian duty of keeping that day holy, and its sole motive to enforce the observance of that duty."

This view was followed in the later Ohio cases, *McGatrick v. Wason* (1855), 4 Ohio St. 566, and *Board of Education of Cincinnati v. Minor, et. al.* (1872), 23 Ohio St. 211. In the latter case, the Court held that Christianity was part of the law of the land in the sense that the Constitution and laws were made by a Christian people.

The Louisiana Supreme Court decided similarly to the Ohio Courts, in *State v. Bott* (1879), 31 La. An. 663.

Most of the States, however, have recognized that, for some purposes and in some sense at least, Christianity is a part of their common law, the more general view being that it is part of the common law no further than Lord CAMPBELL declared it to be part of the common law of England. Many loose utterances, as stated, will be found throughout the decisions, declaring the doctrine broadly, but the well considered judgments practically establish the above qualification.

Taking up the more important decisions of the State Courts, *People v. Ruggles* (1811), 18 Johns. (N. Y.) 210, was an indictment for blasphemy. It was decided that blasphemy against God, and contumelious reproaches and profane ridicule of Christ or the holy scriptures, were offences punishable at common law, whether uttered by words or writings. And it was held that wantonly, wickedly and maliciously uttering the following words: "Jesus Christ was a bastard and his mother must be a whore," was a public offence and punishable by the common law of New York. It was said by Chief Justice KENT—

"The people of this State, in common with the people of this country, prefer the general doctrines of Christianity as the rule of their faith and practice; and to scandalize the Author of these doctrines, is not only, in a religious point of view, extremely impious, but even in respect to the obligations due to society, is a gross

violation of decency and good order. * * * * Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law. The statute for preventing immorality consecrates the first day of the week as holy time, and considers the violation of it as immoral." (Pp. 293-7.)

In *Andrew v. New York Bible and Prayer Book Society* (1850), 4 Sandf. 156, the New York Superior Court decided that a legacy to the Bible Society was not a pious use, authorized by law. In the course of his opinion, Judge DUER, said :

"The maxim that Christianity is part and parcel of the common law, has been frequently repeated by judges and text writers, but few have chosen to examine its truth, or to attempt to explain its meaning. We have, however, the high authority of Lord MANSFIELD and of his successor, the present Chief Justice of the Queen's Bench [Lord CAMPBELL] for stating as its true and only sense, that the law will not permit the essential truths of revealed religion to be ridiculed and reviled. In other words, blasphemy is an indictable offence at common law. (p. 182.)

People v. Hayman (1860), 20 How. Pr. (N. Y.) 76, was decided by the same Court, holding that the Sunday law which prohibited certain exhibitions and plays within the city and county of New York, was constitutional, Judge HOFFMAN relying chiefly on the ground that Sunday was a day of rest divinely ordained.

Lindenmuller v. The People (1861), 33 Barb. (N. Y.) 548, was a case where the Supreme Court of New York sustained an indictment for giving theatrical exhibitions on Sunday, contrary to the Sunday law. The decision supported the Sunday law on the dual ground, (1) that the common law of the State recognized the institutions of Christianity to the extent that acts interfering with Christian worship and tending to disrespect of the Christian religion might be restrained ; (2) that the Sunday law was a valid police measure. The case of *People v. Ruggles* (*supra*) was relied on as authority for the first of these positions and as justifying its application to the case in hand. The history of the maxim that Christianity was part of the common law of New York was examined. Said ALLEN, J.:

"It was conceded in the convention of 1821, that the Court in *People v. Ruggles*, did decide that the Christian religion was the law of the land, in the sense that it was preferred over all other religions, and entitled to the recognition and protection of the temporal courts by the common law of the State. * * * * Mr. Post proposed an amendment to obviate that decision, to the effect that the judiciary should not declare any particular religion to be the law of the land. The decision was vindicated as a just exponent of the Constitution and the relation of

the Christian religion to the State; and the amendment was rejected. * * * One class, including Chief Justice SPENCER and Mr. King, regarded Christianity as a part of the common law adopted by the Constitution; another class, in which were Chancellor KENT and Mr. Van Buren, were of the opinion that the decision was right, not because Christianity was established by law, but because Christianity was in fact the religion of the country, the rule of our faith and practice, and the basis of public morals. According to their views, as the recognized religion of the country, 'the duties and injunctions of the Christian religion' were interwoven with the law of the land, and were part and parcel of the common law, and 'maliciously to revile it is a public grievance, and as much so as any other public outrage upon common decency and decorum.' " (Per CH. KENT in debate.)

The Court of Appeals, in *Smith v. Wilcox* (1862), 24 N. Y. 353, declared the Sunday statute to be in harmony with the religion of the country, and the religious sentiment of the public, and for the support and maintenance of public morals and good order. "Its design is * * * to secure to the day the outward respect and observance which is due to it as the acknowledged Sabbath of the great mass of the people, to protect the religion of the community from contempt and unseemly hindrances, and to its professors the liberty of quiet and undisturbed worship on the day set apart for that purpose."

In *Neuendorff v. Duryea* (1877), 69 N. Y. 557, the doctrine of *Lindenmuller v. The People* (*supra*) was followed, and a bill for injunction against the police commissioners, to prevent them from interfering with complainant's operatic and dramatic entertainment on Sunday, was refused.

The most celebrated case, involving a consideration of the relation of the law of Pennsylvania to Christianity, is *Vidal v. Girard's Executors* (1844), 2 How. (43 U. S.) 127. The Supreme Court of the United States there decided that the will of Stephen Girard, in its prohibition of the employment or admission within Girard College of clergymen, was not contrary to the law of Pennsylvania. Mr. Webster sought to have the Court declare that Christianity was generally, and for all purposes, part of the law of Pennsylvania, so that any indirect reflection upon it, even of an argumentative kind, such as might be suggested by the will in question, was illegal and against the policy of the Pennsylvania law. The Court declined to take this view. Said Mr. Justice STORY, (p. 198):

"It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that State, as found in its constitution of government. The Constitution of 1790 (and the like provision will in substance, be found in the Constitution of 1776, and in the existing Constitution of 1838,) [and in the Constitution of 1874, Art. I § 3], expressly declares, 'That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.' Language more comprehensive, for the complete protection of every variety of religious opinion, could scarcely be used, and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in *Updegraph v. The Commonwealth* (1824), 11 S. & R. (Pa.) 394."

Cooley in his *Constitutional Limitations* (*472) remarks upon this :

"It may be doubted, however, if the punishment of blasphemy is based necessarily upon an admission of the divine origin or truth of the Christian religion, or incapable of being otherwise justified."

The case of *Updegraph v. The Commonwealth* (1824), 11 S. & R. (Pa.) 400, arose on an indictment for saying "That the Holy Scriptures were a fable: That they were a contradiction, and that although they contained a number of good things, yet they contained a great many lies." The utterance was in the course of a debate. The defendant was convicted and fined five shillings and costs. The Supreme Court sustained the conviction. The indictment was under an Act of Assembly whose provisions have been in force in the State since 1700 and now form part of its criminal law. (Act of 31 March 1860, §30, P. L. 392). The penalty is directed against whosoever "shall wilfully, premeditatedly, and despitefully blaspheme, or speak loosely and profanely of Almighty God, Christ Jesus, the Holy Spirit, or the Scriptures of Truth." The Court said,

"Christianity, general Christianity, is and always has been a part of the common law of Pennsylvania; * * * with liberty of conscience to all men * * * It is only the malicious reviler of Christianity who is punished * * * It is open,

public vilification of the religion of the country that is punished, * * * to preserve the peace of the country by an outward respect to the religion of the country * * * If from a regard to decency and the good order of society, profane swearing, breach of the Sabbath, and blasphemy are punishable by civil magistrates, these are not punished as sins or offenses against God, but crimes injurious to, and having a malignant influence on, society."

By the side of this early utterance of the Supreme Court of Pennsylvania, should be placed the remarks of the Court, speaking by GIBSON, C. J., in *Harvey v. Boies* (1829), 1 P. & W. (Pa.) 12, 13 :

"Christianity has been indefinitely said to be a part of the law of the land. The law undoubtedly avails itself of the obligations of Christianity as instruments to accomplish the purposes of justice. * * * Christianity is indeed recognized as the predominant religion of the country, and for that reason are not only its institutions, but the feelings of its professors guarded against insult from reviling or scoffing at its doctrines; so far it is the subject of special favor. But further the law does not protect it."

All the later utterances of the Court upon the subject have not been as guarded as those in these cases, so that there has been some doubt as to how far Christianity in fact is part of the law of Pennsylvania. But the more careful judgments of the Court have maintained the limitations of these early cases. In *Mohney v. Cook* (1855), 26 Pa. 342, 347, the Court in similar language to that used by Chief Justice GIBSON, declared that Christianity is part of the law, in that its customs, institutions and ethical principles are recognized and followed by the mass of the people and are therefore to be respected by the minority. Said LOWRIE, J. :

"The declaration that Christianity is part of the law of the land, is a summary description of an existing and very obvious condition of our institutions. We are a Christian people, in so far as we have entered into the spirit of Christian institutions, and become imbued with the sentiments and principles of Christianity; and we cannot be imbued with them, and yet prevent them from entering into and influencing, more or less all our social institutions, customs and relations, as well as all our individual modes of thinking and acting. It is involved in our social nature, that even those among us who reject Christianity, can not possibly get clear of its influence or reject those sentiments, customs and principles which it has spread among the people, so that, like the air we breathe, they have become the common stock of the whole country, and essential elements of its life. It is perfectly natural, therefore, that a Christian people should have laws to protect their day of rest from desecration. Regarding it as a day, necessarily and divinely set apart for rest from worldly enjoyments, and for the enjoyment of spiritual privi-

leges, it is simply absurd to suppose that they would leave it without any legislative protection from the disorderly and the immoral."

Said SHARSWOOD, J., in *Zeisweiss v. James* (1870), 63 Pa. 465, 471:

"It is in entire consistency with this sacred guarantee of the rights of conscience and religious liberty, to hold that, even if Christianity is no part of the law of the land, it is the popular religion of the country, an insult to which would be indictable as directly tending to disturb the public peace. The laws and institutions of this State are built on the foundation of reverence for Christianity. To this extent, at least, it must certainly be considered as well settled that the religion revealed in the Bible is not to be openly reviled, ridiculed or blasphemed, to the annoyance of sincere believers who compose the great mass of the good people of the Commonwealth."

Some of the justices seem to have accepted the doctrine in a fuller sense than the above decisions warrant. For example, COULTER, J., in *Brown v. Hummel* (1847), 6 Pa. 86, and *Specht v. Commonwealth* (1848), 8 id. 312; STRONG, READ and AGNEW, JJ., in *Sparhawk v. Union Passenger Railway Company* (1867), 54 id. 401. See also the opinion of ALLISON, P. J., in *Granger v. Grubb* (1870), 7 Phila. 350, 355.

The opinion of the Court, by SHAW, C. J., in *Commonwealth v. Kneeland* (1838), 20 Pick. (Mass.) 206, shows that for some purposes Christianity is part of the law in Massachusetts.

State v. Chandler (1837), 2 Harr. (Del.) 553, was an indictment for blasphemy. Chief Justice CLAYTON examines the doctrine at length in the following language:

"It is true, that the maxim of the English law 'that Christianity is a part of the common law' may be liable to misconstruction, and has been misunderstood. It is a current phrase among the special pleaders, that the almanac is a part of the law of the land. (Chitt. Pl. 121, etc.) By this it is meant, that the courts will judicially notice the days of the week, month and other things, properly belonging to an almanac, without pleading or proving them. * * * So too, we apprehend every court in a civilized country is bound to notice in the same way, what is the prevailing religion of the people. If, in Delaware, the people should adopt the Jewish or Mahomedan religion, as they have an unquestionable right to do if they prefer it, the court is bound to notice it as their religion, and to respect it accordingly. * * * The declarations of Lord HALE, Lord RAYMOND and others, who pronounced Christianity to be parcel of the common law, are all to be taken in reference to the cases of blasphemy before them; and for the purpose of punishing such blasphemies as they condemned, they noticed that Christianity was the religion of England, and in this sense a part of the common law of the land. * * * It will be seen that, in our judgment of the Constitution and laws of

Delaware, the Christian religion is a part of those laws so far that blasphemy against it is punishable while the people prefer it as their religion and no longer."

Following some of the above authorities, Christianity has also been said to be part of the law of Arkansas—*Shover v. State* (1880), 5 Eng. 250; North Carolina—*Melvin v. Easley* (1860), 7 Jones (Law) 356, 367; South Carolina—*Charleston v. Benjamin* (1846), 2 Strob. 508; Missouri—*State v. Amb's* (1854), 20 Mo. 214, 216, in which case it was said that Christianity was part of the law in the sense that the Constitution was made by Christian men.

The text writers agree, either in denying altogether that Christianity is a part of the common law of the land in any legal sense, or in recognizing that it is part of the law only to the extent and in the manner above indicated. Perhaps the most lucid statement of the doctrine is that of Dr. Wharton in his work on Criminal Law. He says (Sec. 20):

"Christianity undoubtedly has affected the common law in the United States in the following important particulars: (1.) In most jurisdictions, we have adopted the principles of the canon law in relation to matrimony and succession. The rules which the English ecclesiastical courts imposed in this connection, we have, in a large measure, accepted as binding us; and in several States we have recognized as indictable, certain offenses, such as adultery and fornication, which in England can only be prosecuted in the ecclesiastical courts. (2.) We have also, adopting the ethical rules of Christianity, as distinguished from those of heathendom, made indictable breaches of domestic duty which were not criminally punishable by the old Roman law. (3.) Witnesses, unless they have conscientious scruples, or believe another form of oath more binding, are sworn as a rule on the Christian Bible. But beyond this we have not gone. We make blasphemy of Christianity indictable; but this is because such blasphemy is productive of a breach of the public peace, and not because it is an offense against God. We treat a disturbance of Christian worship as indictable, when such disturbance amounts to a private assault or to public disorder; but we give that same protection to non-Christian assemblies. And in no State does the government interfere to prosecute offenses consisting of a denial of Christian dogma, or a rejection of Christian sanctions. Nor in any State is Christianity in such sense part of the common law that the State can determine what are the dogmas of Christianity. That which is part of the common law can be changed by statute; but as the dogmas of Christianity are beyond the reach of statute, we must hold that they are not part of the common law of the land."

See also Sedgwick "*Construction of Statutory and Constitutional Law*," p. 14.

Cooley's Constitutional Limitations, p. 472.

The fact that many judges have asserted, without qualifying their statements, that Christianity is part of the common law has led to whatever uncertainty exists on the subject. Careful thinking and careful writing would have eliminated much in the opinions of courts that has only tended to confusion. It is difficult to see how the American, not to say the Anglo-Saxon, idea can permit of the assertion that Christianity is part of the law in any other sense than that indicated by Dr. Wharton. There are doubtless a large number of well-meaning people who without a proper apprehension of the absolute sovereignty of the individual in matters of faith, are willing that the State shall be made to declare the truth of their particular form and philosophy of religion. But it would seem to be no more the function of an American State, to declare the truth of the religion of the majority than that of the minority.

Christianity, as a religion, is an affair of the individual alone. It does not cease to be so because many or most individuals adopt it. Christianity, as an ethical system, pervades, and, as we believe, sustains, modern society. Its pervading force furnishes the law, and to custom, lofty standards of right and wrong, whose adoption both makes and promises a better race because of it. But as its teachings are coming to be better understood, they seem to vindicate the political philosophy which would withdraw the individual from constraint in matters of religious opinion, by having the State neither enforce nor assert any particular doctrine in the realm of conscience. The absolute divorce of religion and the State is the postulate of this philosophy. Though its prevalence does indeed mark the triumph of the broad philanthropy of Christian men, it nevertheless implies as within its proper import the separation of dogmatic Christianity and the law.

A. H. WINTERSTEEN.

Philadelphia.

Supreme Court of Wisconsin.

STATE *ex rel.* WEISS *et al.*

v.

DISTRICT BOARD OF SCHOOL-DIST. NO. 8 OF THE
CITY OF EDGERTON.

The adoption of any version of the Bible as a text book in the public schools of Wisconsin and the reading therefrom by the teachers without comment, are in violation of the Constitutional provisions forbidding sectarian instruction.

The term "Sectarian" is used in the Constitution of Wisconsin in the sense of the doctrine of some religious people which is not common to all religious people.

The term "Sectarian instruction" in the Constitution of Wisconsin, refers exclusively to instruction in religious doctrines which are not believed by all religious bodies.

Reading from the Bible is instruction, though unaccompanied by any comment.

The stated reading of the Bible in the public schools of Wisconsin is "Worship," and the school room a place of worship, within the Constitutional prohibition that no man shall be compelled to attend, erect or support any place of public worship, or maintain any ministry, against his consent.

Religion as a system and not as a natural law, cannot be taught in the common schools of Wisconsin, but morality and good conduct may be inculcated.

Appeal from Circuit Court, Rock County :

The relators filed their petition in the Circuit Court of Rock County, praying that a writ of *mandamus* issue to the district board of school district No. 8 of the city of Edgerton, in said County, commanding said board to cause the teachers in the public schools of that district to discontinue the practice, which had theretofore prevailed, of reading therein selections from the Bible. The petition is as follows :

"The petition of Frederick Weiss, W. H. Morrissey, Thomas Mooney, James McBride, J. C. Burns, and John Corbett respectfully shows unto this Court that your petitioners are, and for many years last past have been, residents and tax-payers of the city of Edgerton, in Rock county Wis. ; that there are in said city of Edgerton, kept and maintained in accordance with, and in pursuance of, the Revised Statutes of said State of Wisconsin, certain free common schools; that the residents of the said city of Edgerton, who are taxed for the support of said schools, are equally entitled to the benefits thereof by having their children instructed therein according to law ; that your petitioners are parents of children, which children they are desirous of having educated in said schools ; that said children of your petitioners, respectively, to-wit, Annie Mooney, Ettie Weiss, Thomas Burns, Nora Corbett, Bessie Corbett, Katie Corbett, Annie McBride, Jane McBride, and James McBride, are pupils of, and attend said schools for the purpose of receiving instruction. Your petitioners further show that certain of the

teachers employed by the district board having charge of said schools to conduct the same, and instruct the pupils attending said schools, read to said pupils, and, among them, the children of your petitioners above named, each and every day when said schools are in session and during the hours fixed for the instruction of pupils, certain portions of the book commonly known as the 'Bible;' said teachers themselves selecting the portions so read, and uniformly using in such reading the translation of said Bible known as the 'King James Version.' That such reading as above set forth, was and is a custom followed by certain of said teachers in said schools. Your petitioners further show that they, and many others of the residents and tax-payers of said city and school district, whose children attend said schools, and are under the control and are instructed by the teachers above named, and who are lawfully entitled to the equal benefits of said schools, are, together with their said children, members of the Roman Catholic Church, and conscientiously believe its doctrines, faith and forms of worship; and that by said church the version of the scriptures referred to in this petition is taught and believed to be incorrect as a translation, and incomplete, by reason of the omission of a part of the books held by such church to be integral portions of the inspired canon; and it is further taught by the said Roman Catholic Church, and believed by its members, that the scriptures ought not to be read indiscriminately, inasmuch as said church has divine authority, as the only infallible teacher and interpreter of the same, and that the reading of the same without note or comment, and without being expounded by the only authorized teachers and interpreters thereof, is not only not beneficial to the children in said schools, and especially to the above named children of your petitioners, who are members of said church, but likely to lead to the adoption of dangerous errors, irreligious faith, practice and worship; and that by reason thereof the practice of reading the King James Version of the Bible, commonly and only received as inspired and true by the Protestant religious sects, is regarded by the members of said Roman Catholic Church, among whom are your petitioners, as contrary to the rights of conscience, and as wholly contrary to, and in violation of, the law; and that your petitioners believe such exercises as are above set forth, and each and all of them, to be sectarian instruction, and in violation of Section 3, Art. 10, of the Constitution of the State of Wisconsin. Your petitioners further show that they, with others of said residents and tax-payers of said city and school-district, have petitioned and requested said board, having the control and management of said schools, to interfere, as they lawfully might and should do, and to direct said teachers to discontinue the unlawful and wrongful practices and exercises above set forth, and to confine the instruction, to be given by such teachers, to the studies and branches of knowledge lawfully provided for the said pupils; but that said board has wholly neglected and refused, and still does wholly neglect and refuse, to in any way interfere in said matter, and has and does wholly refuse to perform the duties legally devolving upon it, and has and does now permit said above-mentioned exercises to be carried on as above set forth. Wherefore your petitioners pray that a writ of *mandamus* may issue from said Court to said district board, commanding said board to cause said teachers to discontinue the practices and exercises above set forth."

Upon such petition an alternative writ of *mandamus* was issued and served, to which the district board made return as follows:

" I. The answer of the district board of school-district number eight of the city of Edgerton, to the amended alternative writ of *mandamus* issued by the circuit court for Rock county in the above entitled action. The district board of school district number eight of the city of Edgerton, for return and answer to the amended alternative writ of *mandamus*, issued in the above entitled action, admit that the said Frederick Weiss, W. H. Morrissey, Thomas Mooney, James McBride, J. C. Burns, and John Corbett are, and for many years have been, residents and tax-payers of the city of Edgerton; that there is, in the city of Edgerton, kept and maintained in accordance with, and in pursuance of, the statutes of the State of Wisconsin, a free common school; that the residents of the city of Edgerton taxed for the support of said school, and having children to be instructed therein, are entitled to the benefits of such school; that the petitioners, Frederick Weiss, Thomas Mooney, James McBride, J. C. Burns, and John Corbett, are parents of children, which they are desirous of having educated in said school, that the children named in said amended alternative writ are pupils of and attend said school for the purpose of receiving instruction therein.

" The said district board, further answering the allegations of said amended alternative writ, admits that two of the teachers employed by said district board, and having charge of two of the departments in said school, did, prior to the filing of this petition of the relators of this action, read to the pupils in their departments daily, when said school was in session, portions of the book known as the ' Bible; ' that said teachers selected the portions of the Bible so read by them; that these selections so read were made from the translation of the Bible known as the ' King James Version,' and that some of the children whose names are set forth in the said amended alternative writ attended and received instruction in the departments of said school in which such selections from the Bible were so read; but said board allege that the children of petitioners were not, and are not, required to remain in said school during the reading of such portions of the Bible, but are at liberty to withdraw during such reading, if they desire so to do.

" The said district board, further answering the allegations of said alternative writ, deny that selections from the Bible were read by all of the teachers in said school, or that such selections were read in all the departments of said school.

" The said district board, further answering the allegations of said amended alternative writ, admit that the petitioners above named, together with the children in said alternative writ named, were and are members of the Roman Catholic Church; that they believe in the doctrines, faith, and forms of worship of the Roman Catholic Church, and that by said Roman Catholic Church the translation of the Bible known as the ' King James Version ' is believed to be incorrect as a translation, and incomplete, by reason of the omission of certain books held by said church to be integral portions of the inspired canon.

" The said district board, further answering the allegations of said amended alternative writ, admits that it is taught by the said Roman Catholic Church, and believed by some of its members, that the Scriptures ought not to be read indiscriminately; that said Roman Catholic Church has divine authority as the only infallible teacher and interpreter of the Scriptures; and that the reading of the same without note or comment, and without being expounded by the only authorized teacher and interpreter thereof, is not only not beneficial to children, but

likely to lead to the adoption of dangerous errors, irreligious faith, practice, and worship; and that by reason thereof the practice of reading the King James Version of the Bible is regarded by some of the members of the Roman Catholic Church, and by the petitioners above named, as contrary to the rights of conscience, and as contrary to, and in violation of, law; and that the petitioners above named believe the reading of the King James Version of the Bible, as set forth in said amended alternative writ, to be sectarian instruction, in violation of Section 3, Art. 10, of the Constitution of the State of Wisconsin.

"But said district board, further answering the allegations of said amended alternative writ, upon information and belief deny that the Roman Catholic Church is the only infallible teacher or interpreter of the Bible; but, on the contrary, said board allege, upon information and belief, that every person has the right to read the Bible, and interpret it for himself; that the claim of the relators in that regard is sectarian; and that an enforcement thereof would be a violation of the Constitution of this State. The said district board, upon information and belief, further deny that the reading of selections from the King James Version of the Bible, as alleged in said alternative writ, is contrary to the rights of conscience or in violation of law, or that the same is sectarian instruction, or in violation of Section 3, of Article 10, of the Constitution of this State, or of any provision or requirement of said Constitution, or of the statutes or the common law of this State; and the said board, upon information and belief, deny that the reading of such selections from the Bible by some of the teachers in said school, in some of the departments thereof, as the same were in fact read, was contrary to, or in violation of, law, or that the same was, or is, sectarian instruction, or that the same was, or is, in violation of Section 3, of Article 10, of the Constitution of this State, or that the same was, or is, in violation of any provision or requirement of the Constitution or the statutes or the common law of this State.

"The said district board, further answering the allegations of said amended alternative writ, admits, that they have permitted, and now do permit, some of the teachers in some of the departments of said school to read, without comment, selections made by such teachers from the King James Version of the Bible; and said board, upon information and belief, allege that they have the lawful right to permit such selections to be made and read by some of said teachers in some of the departments of said school.

"The said district board, further answering the allegations of said amended alternative writ, upon information and belief allege that they have no lawful right or authority to require the teachers in said schools to discontinue the reading of selections from the Bible in said school; and that therefore they ought not, and cannot, lawfully require said teachers to discontinue the reading of selections from the Bible in some of the departments in said school.

"II. The said district board for a further answer and return to the allegations of the amended alternative writ issued by said court in this action, admit that the petitioners named in said writ, with their children, are members of the Roman Catholic Church, and that they believe that the translation of the Bible known as the 'King James Version' is incorrect as a translation, and incomplete, by reason of the omission of a portion of the books held by the Roman Catholic Church to be integral portions of the inspired canon. But the said district board, upon information and belief, allege that the said Roman Catholic Church do also believe

and teach that the translation of the Bible known as the 'Douay and Rheims Version,' and commonly called the 'Douay Version,' is correct and complete; that said church, and the members thereof, constantly use said Douay Version in the worship conducted in and by said church. And said board, upon information and belief, allege that said translation of said Bible known as the 'King James Version' contains no book, or part of book, not contained in the translation known as the 'Douay Version;' that the King James Version and the Douay Version are different translations of the same Bible; that there is no material difference in said translations; that, while the selections from the Bible read by the teachers in the school of said district were read from the King James Version, the portions and passages so read are contained in the Douay Version, and were not, and are not, materially different from the translation of the same portions and passages of the Bible in the Douay Version, used by said Roman Catholic Church. The said district board, upon information and belief, further show that the following are the only portions of said Bible so selected by the said teachers in said school, and read therein, and that the same were read from the King James Version of said Bible."

Quotations from the Scriptures are inserted in the answer, consisting of the 1st, 15th, 19th, 23d, 24th, 27th, 37th, 46th, 100th, 121st, 125th Psalms; 1st, 3d, 13th, 16th, and 20th verses of chapter 15 of the Book of Proverbs; the 16th, 20th, and 22d chapters of Proverbs; the 2d chapter of Matthew; the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, and 13th verses of the 5th chapter of Matthew; the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th verses of the 6th chapter of Matthew; the 13th chapter of Matthew; the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22d, 23d, 24th, 25th, 26th, 27th, and 28th, verses of the 25th chapter of Matthew; the first 14 verses of the 11th chapter of Luke; the first 28 verses of the 19th chapter of Luke; the first 5 verses of the 21st chapter of Luke; the 4th, 5th, 6th, 7th, and 8th verses of the 14th chapter of Romans; and the 13th chapter of 1st Corinthians. [These citations were peremptorily put aside by LYON, J., in his opinion, see page 296 *infra*.] The answer then proceeds as follows:

"This said district board, upon information and belief, further allege that the portions of the Bible above set forth, and so selected by said teachers, and read in said schools, as aforesaid, were not, and are not, sectarian; that the reading of those portions of the Bible above set forth was not, and is not, sectarian instruction; that the reading of the portions of the Bible above set forth was not, and is not, contrary to the rights of conscience, nor in violation of Section 3 of Article 10

of the Constitution, or the statutes, or the common law of this State; and that said Section 3 of Article 10 of the Constitution was not intended by the people of said State, when said Constitution was adopted, to prohibit the reading of the Bible in the schools of said State, and does not prohibit the reading of the Bible in such schools.

"III. The said district board, for a further answer and return to the amended alternative writ issued by said court in this action, respectfully shows that prior to, and at the time of, the filing of the petition of the relators in this action, said school-district number eight was duly formed and organized as a school-district under and in pursuance of the laws of this State; that prior to the time of the filing of said petition the said school-district owned and maintained a school-house in said district; that prior to the time of filing such petition a school with different departments therein, was maintained and taught in said school-house under the direction of said district board; and that such school was being maintained and taught in said school-house at the time of the filing of the petition of the relators herein. The said district board further show that, prior to the time of filing said petition, the district board of said school-district had the right and authority to determine what school and text-books should be used in the several branches of study pursued in the school of said district; that, prior to the filing of said petition, the said district board, in pursuance of their authority, decided and determined what school and text-books should be used in the school in said district, and made a list of such books, and adopted the same as the books to be used in said district, in the manner required by law; that such list was, and is, as follows."

[Here follows a list of such text-books, one of which is the Bible.] The return then goes on to its close as follows:

"The said district board further show that the translation of the Bible selected and included in said list of text and school books, and adopted by said board, was, and is, the version thereof known as the 'King James Version,' and that the readers so selected and included in said list, and adopted by said board, contain many selections from the King James Version of the Bible. The said district board further show that said King James Version of the Bible was so selected by said board, and included in said list of text-books, and adopted by said board, for the purpose of being used in the general education of the scholars attending said school, and not for sectarian instruction. The said district board further show that, when a list of text-books has been made by it, it is by the statutes of this State prohibited from making any changes in said list for the term of three years; that it cannot make any change in said list until after the expiration of three years, without the consent of the State Superintendent; and that three years have not elapsed since said list of text-books was so made by said district board. The said district board, upon information and belief, further show that prior to the time of reading of the Bible in the school of said district, and prior to the adoption of said list of text-books by said district board, as aforesaid, the Superintendent of Public Instruction in said State of Wisconsin recommended for adoption and use in the schools of said State a list of text-books; that in such list of text-books so recommended by said State Superintendent, and as a part thereof, is the

King James translation of the Bible; and that such recommendation has not been in any way revoked or withdrawn, but still remains in full force.

"The said district board, for a further return and answer to the amended alternative writ issued in this action, allege that said school-district was, long prior to the reading of the Bible as mentioned in the petition of the relators, duly formed and organized as a school-district under and in pursuance of the statutes of this State; that the members of said district board were duly elected and qualified as required by law; that, as members of such board, they entered upon the discharge of their duties, and the performance of the trusts reposed in them, as members of such board; that the school in said district is established and maintained for the benefit and advantage of all of the children residing in said district between the ages of four and twenty years; that there are residing in said school-district, in addition to the children named in the petition of the relators, about five hundred children, a small proportion of whom are children of Catholic parents, or members of the Roman Catholic Church, but nearly all of whom are children of Protestant parents; that such school is established and maintained for the purpose of giving and securing to all of the children within the ages aforesaid, residing in said district, as complete an education as the educational facilities of said district will permit; that it is the duty of said district board to so maintain conduct, and control said school that every child within the ages aforesaid, residing in said district, shall have the advantage of every educational facility that may be afforded by said school; that the Bible is an important text-book in said school; that there is no book known to said board that can be used as a text-book in said school which will take the place of the Bible in said school; that the reading of the Bible to the children attending said school at suitable and proper times is an important part in the education of the children attending said school; that the parents of the children in said district, with the exception of the petitioners and a very few others, desire that the King James translation of the Bible be used as a text-book in said school; that the reading of the Bible in said school is not in any way sectarian instruction in said school, and is not in any way prohibited by the Constitution or the laws of this State.

"And the said board, upon information and belief, further allege that it is the duty of said board to require said Bible to be used in said schools as a text-book at suitable and proper times, when the use thereof will aid in the education of the children attending said school; and that said board has no right to prohibit, and should not attempt to prohibit the use of the Bible in said school at proper and suitable times, when such use will aid in making more complete the education of the children attending said school. And said board submits that for the reasons above set forth they ought not to discontinue the use of the Bible in the school of said district, and that they have no right nor authority to discontinue such use of the Bible in said school.

"Wherefore said board pray the judgment of this Court denying the prayer of the petition of the relators, and that said board recover their costs and disbursements in this action."

The petitioners interposed a general demurrer to such answer and return, and the same was overruled by the Court, and

the petitioners appeal to this Court from the order overruling such demurrer.

Winans & Hyser, J. H. M. Wigman and H. J. Desmond, for appellants.

A. A. Jackson and J. P. Towne, for respondent.

LYON, J., March 18, 1890 (after stating the facts as above). The petitioners are residents and tax-payers of the city of Edgerton, and their children are pupils in the public schools of that city. They allege in their petition that certain of the teachers, employed by the district board having charge of such schools, read daily to the pupils therein, during school hours, certain portions of King James' Version of the Bible, selected by the teachers; and that the petitioners have requested the district board to require the teachers to discontinue such practice, but the board refuses to do so. The petitioners further allege that such practice is a violation of certain provisions of the Constitution of this State, hereinafter more particularly mentioned, and pray that a writ of *mandamus* may issue from the Circuit Court to the school board, commanding such board to cause the teachers to discontinue the practice and exercises complained of. Upon the filing of such petition in the Circuit Court, the usual alternative writ of *mandamus* was issued, and served upon the school board. The board made return to such writ by filing an answer to the petition, admitting the existence of the practice complained of, and the refusal of the board to cause it to be discontinued, denying the authority of the board to interfere with the practice, and alleging that the practice is legal and proper, and that the Bible is a duly authorized and selected text-book for use in said schools. Further statement of the contents of the petition and answer is hereinafter made. The petitioners demurred to the answer of the school board, alleging, as ground of demurrer, that the answer fails to state facts showing that a peremptory writ of *mandamus* as prayed should not issue. The Circuit Court overruled the demurrer, and the petitioners appeal to this Court from the order in that behalf.

The questions which must be adjudicated on this appeal have been argued by the respective counsel with great ability, and with all the earnestness of intense personal conviction. The

arguments and the opinion of the learned circuit judge, overruling the demurrer to the answer of the respondent, show great learning and historical research, and have been valuable to us in our deliberations upon the case.

The constitutional objection urged by the petitioners to the reading of the Bible in the district schools are that (1) it violates the rights of conscience; (2) it compels them to aid in the support of a place of worship against their consent, (Const. Art. 1, § 18); (3) it is sectarian instruction (Id. art 10, § 3). The opinion will be confined quite closely to a discussion of the question whether the adoption of the Protestant, or King James Version of the Bible, or any Version thereof, in the public schools in the city of Edgerton, as a text book, and the reading of selections therefrom in those schools at the times and in the manner stated in the answer, is sectarian instruction, within the meaning of that term as used in section 3, art. 10, of the Constitution, which ordains that no sectarian instruction shall be allowed in the district schools of this State.

I. Some questions as to the effect of the demurrer upon certain allegations in the answer of the respondent to the petition for a writ of *mandamus* will first be considered. It is a familiar rule that a demurrer to any pleading reaches back through the whole record, and seizes hold of the first defective pleading. In this case the petition for a writ of *mandamus*, and the answer of the school board thereto, constitute the pleadings. Hence, if the petition is insufficient, judgment on the demurrer to the answer should go for the respondent, although the answer may also be insufficient. This rule is invoked by the learned counsel for the respondent. It best comports with the gravity and importance of the case to fully consider and determine it upon the merits, to the end that the controversy which has grown out of the practice complained of be put at rest in this State. Hence no narrow or technical construction of the pleadings should prevail which will defeat or postpone a final adjustment of the controversy. The petitioners are members of the Roman Catholic Church, and believers in its doctrines. Hence it is quite natural that most of the averments in their petition should be made, as they in fact are, from the stand-point of such doctrines. But should it be held

that members of that church have no valid grounds, as such, for their objections to the reading of the Bible in the district schools, still the petition contains general averments sufficiently broad to cover any valid objection to such reading which might be made by any citizen of the State aggrieved by the action of the school board. These averments are "that the residents of said city of Edgerton, who are taxed for the support of said schools, are equally entitled to the benefits thereof, by having their children instructed therein according to law;" and that such reading of the Bible "is contrary to the rights of conscience, and wholly contrary to and in violation of the law; and that your petitioners believe such exercises as above set forth, and each and all of them, are sectarian instruction, and in violation of section 3, art. 10, of the Constitution of the State of Wisconsin." The answer contains several averments which counsel claim are admitted by the demurrer, but which are mere legal conclusions from facts stated therein; such as, that the reading of the Bible in schools is not sectarian instruction, or that the school board have lawful right to permit, and none to prevent, such reading of the same. Averments of this kind, or of facts not well pleaded, are not admitted by a general demurrer, to the pleading. (5 Amer. & Eng. Cyclop. Law, 551, and cases cited in note 6.)

It is averred in the return that there is no material difference between the King James Version of the Bible, used in the Edgerton schools, and the Douay Version, which is the only one recognized by the Catholic Church as correct and complete. It is universally known that there are differences between these two versions in many particulars, which the respective sects regard as material. Hence the averment is against common knowledge, and therefore not well pleaded. Our conclusion is, that if such reading of the Bible is sectarian instruction, or if it violates any other Constitutional right of any citizen or sect, the petition is sufficient.

II. In considering whether such reading of the Bible is sectarian instruction, the book will be regarded as a whole; because the whole Bible, without exception, has been designated as a text-book for use in the Edgerton schools, and the claim of the school board is substantially (although perhaps

not in terms) that the whole contents thereof may lawfully be so read therein, if the teachers so elect. This being so, it is quite immaterial if the portions thereof set out in the return as the only portions thus far read are not sectarian. Yet it should be observed that some of the portions so read seem to inculcate the doctrines of the divinity of Jesus Christ, and the punishment of the wicked after death, which doctrines are not accepted by some religious sects.

III. The courts will take judicial notice of the contents of the Bible, that the religious world is divided into numerous sects, and the general doctrines maintained by each sect; for these things pertain to general history, and may fairly be presumed to be subjects of common knowledge. (1 Greenl. Ev. §§ 5, 6, and notes.) Thus they will take cognizance, without averment, of the facts that there are numerous religious sects called "Christians," respectively maintaining different and conflicting doctrines; that some of these believe the doctrine of predestination, while others do not; some the doctrine of eternal punishment of the wicked, while others repudiate it; some the doctrines of the apostolic succession, and the authority of the priesthood, while others reject both; some that the holy scriptures are the only sufficient rule of faith and practice, while others believe that the only safe guide to human thought, opinion, and action is the illuminating power of the divine spirit upon the humble and devout heart; some in the necessity and efficacy of the sacraments of the church, while others reject them entirely; and some in the literal truth of the scriptures, while others believe them to be allegorical, teaching spiritual truth alone or chiefly. The courts will also take cognizance of numerous other conflicts of doctrine between the sects; also that there are religious sects which reject the doctrine of the divinity of Christ, among which is the Hebrew, or Jewish, sect, which denies the inspiration and authority of the New Testament; and further, that the sect known as the "Latter Day Saints," or "Mormons," while accepting the Bible, is reputed to believe the Book of Mormon, and the deliverances of its own alleged prophets, to be of equal authority therewith. Many, it not most, of the above sects include within their membership

citizens of Wisconsin. A great majority, if not all, of them base their peculiar doctrines upon various passages of scripture, which may reasonably be understood as supporting the same. It should here be said that the term "religious sect" is understood as applying to people believing in the same religious doctrines, who are more or less closely associated or organized to advance such doctrines, and increase the number of believers therein. The doctrines of one of these sects which are not common to all others are sectarian; and the term "sectarian" is, we think, used in that sense in the Constitution.

IV. Counsel for the school board maintain, in their argument, that the Christian religion is part of the common law of England; that the same was brought to this country by the colonists, and, by virtue of the various colonial charters, was embodied in the fundamental laws of the colonies; that this religious element or principle was incorporated in the various State Constitutions, and in the ordinance of 1787 for the government of the North-West Territory, by virtue of which ordinance it became the fundamental law of the territory of Wisconsin. Numerous quotations are given by him from the above documents, from the utterances of congress and legislatures, and from the writings of our early statesmen, to prove these propositions. That the learned counsel have fairly demonstrated their accuracy is freely conceded. More than that, counsel have proved that many, probably most, of those charters, and some of the State Constitutions, not only ordained and enforced some of the principles of the Christian religion, but sectarian doctrines as well. They have also attempted, at considerable length, to show that the Church of Rome is hostile to our common-school system. This Court neither affirms nor denies the accuracy of this position. Moreover, counsel on both sides have argued, to some extent, as to whether certain religious dogmas are true or false. None of these matters are material or pertinent to the questions to be determined on this appeal. This case must be decided under the Constitution and laws of this State now in force; and it is entirely immaterial to the decision thereof whether the interference of the courts to compel a faithful execution of the law by school boards is invoked by those who are

hostile or friendly to our common-school system. The question is, what is the law of the case? not, what opinions are entertained by those who demand its enforcement? It is scarcely necessary to add that we have no concern with the truth or error of the doctrines of any sect. We are only concerned to know whether instruction in sectarian doctrines has been, or, under existing regulations is liable to be, given in the district schools of the State, and especially in the public schools of the city of Edgerton.

V. We come now to the more direct consideration of the merits of the controversy. The term "sectarian instruction," in the Constitution, manifestly refers exclusively to instruction in religious doctrines, and the prohibition is only aimed at such instruction as is sectarian; that is to say, instruction in religious doctrines which are believed by some religious sects, and rejected by others. Hence, to teach the existence of a supreme being, of indefinite wisdom, power, and goodness, and that it is the highest duty of all men to adore, obey, and love Him, is not sectarian, because all religious sects so believe and teach. The instruction becomes sectarian when it goes further, and inculcates doctrine or dogma, concerning which the religious sects are in conflict. This we understand to be the meaning of the Constitutional prohibition.

That the reading from the Bible in the schools, although unaccompanied by any comment on the part of the teacher, is "instruction," seems to us too clear for argument. Some of the most valuable instruction a person can receive may be derived from reading alone, without any extrinsic aid by way of comment or exposition. The question, therefore, seems to narrow down to this: Is the reading of the Bible in the schools—not merely selected passages therefrom, but the whole of it—sectarian instruction of the pupils? In view of the fact already mentioned, that the Bible contains numerous doctrinal passages, upon some of which the peculiar creed of almost every religious sect is based, and that such passages may reasonably be understood to inculcate the doctrines predicated upon them, an affirmative answer to the question seems unavoidable. Any pupil of ordinary intelligence who listens to the reading of the doctrinal portions of the Bible will be more

or less instructed thereby in the doctrines of the divinity of Jesus Christ, the eternal punishment of the wicked, the authority of the priesthood, the binding force and efficacy of the sacraments, and many other conflicting sectarian doctrines. A most forcible demonstration of the accuracy of this statement is found in certain reports of the American Bible Society of its work in Catholic countries (referred to in one of the arguments), in which instances are given of the conversion of several persons from "Romanism" through the reading of the scriptures alone; that is to say, the reading of the Protestant or King James Version of the Bible converted Catholics to Protestants without the aid of comment or exposition. In those cases the reading of the Bible certainly was sectarian instruction. We do not know how to frame an argument in support of the proposition that the reading thereof in the district schools is not also sectarian instruction.

It should be observed, in this connection, that the above views do not, as counsel seemed to think they may, banish from the district schools such text-books as are founded upon the fundamental teachings of the Bible, or which contain extracts therefrom. Such teachings and extracts pervade and ornament our secular literature, and are important elements in its value and usefulness. Such text-books are in the schools for secular instruction, and rightly so; and the Constitutional prohibition of sectarian instruction does not include them, even though they may contain passages from which some inferences of sectarian doctrine might possibly be drawn. Furthermore, there is much in the Bible which cannot justly be characterized as sectarian. There can be no valid objection to the use of such matter in the secular instruction of the pupils. Much of it has great historical and literary value, which may be thus utilized without violating the Constitutional prohibition. It may also be used to inculcate good morals,—that is, our duties to each other,—which may and ought to be inculcated by the district schools. No more complete code of morals exists than is contained in the New Testament, which reaffirms and emphasizes the moral obligations laid down in the ten commandments. Concerning the fundamental principles of moral ethics, the religious sects do not disagree.

VI. It is urged on behalf of the school board that the Constitution must be interpreted in the light of the surrounding circumstances existing when it was framed and adopted, and that contemporaneous exposition thereof is of great authority. Cases in this Court and elsewhere are cited to these propositions. Undoubtedly, they are correct rules of interpretation, applicable alike to constitutions, statutes and all written instruments, where the language employed is of uncertain import; but, if the words of the instrument are unambiguous, there is no room for construction outside the words themselves, and the above rules cease to be controlling or important. It is proper, however, to consider the constitutional prohibition in the light of such rules of interpretation. On the subject of contemporaneous exposition, counsel refers us to the uniform action of the department of public instruction in this State, from 1858 to the present time, recommending the Bible as a text-book in the district schools, as evidence that the Constitutional provision under consideration was not understood by the framers of that instrument, or the people who adopted it, as excluding from such schools the reading of the Bible. The action of the department upon the subject, showing, as it does, the opinions of the eminent scholars and teachers who have presided over it for a long series of years, is entitled to great weight, and on a doubtful question of construction would doubtless be held controlling. But we do not think the true interpretation of the Constitutional provision under consideration is doubtful or uncertain, or that any extraneous aid is required in order to interpret it correctly; hence our judgment cannot properly be controlled by the action of the department of public instruction, or the opinions of its learned chiefs. The fact probably is that the practice of Bible reading in the district schools was not seriously challenged at the outset, and not subjected to close legal scrutiny until the policy of the department had become fixed. It was but natural that such policy should, to some extent at least, be thereafter adhered to. It is further said that the practice of reading the Bible in the district schools prevailed generally after the adoption of the Constitution. This is claimed to be a most persuasive fact, showing that it was

not the intention of the framers of the Constitution, and the people, to prohibit the practice. We do not know how the fact was, but we must be permitted to doubt whether the practice was ever a general one in the district schools of the State. We are quite confident that it is not so at the present time. It was said in the argument, and not denied, that the practice does not prevail in the public schools in any of the larger cities of the State. But, were the fact otherwise, for the reasons above stated, it would not be controlling.

It may not be uninteresting to consider somewhat certain other circumstances, existing when the Constitution was adopted, which may fairly be presumed to have influenced the inserting therein of the provision against "sectarian instruction" in the district schools. The early settlers of Wisconsin came chiefly from New England and the middle States. They represented the best religious, intellectual, and moral culture, and the business enterprise and sagacity, of the people of the States from whence they came. They found here a territory possessing all the elements essential to the development of a great State. They were intensely desirous that the future State should be settled and developed as rapidly as possible. They chose from their number wise, sagacious, Christian men, imbued with the sentiments common to all, to frame their Constitution. The Convention assembled at a time when immigration had become very large, and was constantly increasing. The immigrants came from nearly all the countries of Europe, but most largely from Germany and Ireland. As a class, they were industrious, intelligent, honest, and thrifty; just the material for the development of a new state. Besides, they brought with them, collectively, much wealth. They were also religious and sectarian. Among them were Catholics, Jews, and adherents of many Protestant sects. These immigrants were cordially welcomed, and it is manifest the convention framed the Constitution with reference to attracting them to Wisconsin. Many, perhaps most, of these immigrants came from countries in which a State religion was maintained and enforced, while some of them were non-conformists, and had suffered under the disabilities resulting from their rejection of the established religion. What more tempt-

ing inducement to cast their lot with us could have been held out to them than the assurance that, in addition to the guarantees of the right of conscience and of worship in their own way, the free district schools in which their children were to be, or might be educated, were absolute common ground, where the pupils were equal, and where sectarian instruction, and with it sectarian intolerance, under which they had smarted in the old country, could never enter? Such were the circumstances surrounding the convention which framed the Constitution. In the light of them, and with a lively appreciation by its members of the horrors of sectarian intolerance, and the priceless value of perfect religious and sectarian freedom and equality, is it unreasonable to say that sectarian instruction was thus excluded, to the end that the child of the Jew or Catholic, or Unitarian, or Universalist, or Quaker, should not be compelled to listen to the stated reading of passages of scripture which are accepted by others as giving the lie to the religious faith and belief of their parents and themselves?

It is argued that the reading of the Bible in the district schools is not included in the Constitutional prohibition of sectarian instruction therein, because the Bible is not specifically mentioned in the Constitution. It is said that, if it was intended that such reading was to be excluded, it would have been so provided in direct terms. The argument may be plausible, but is believed to be unsound. Constitutions deal with general principles and policies, and do not usually descend to a specification of particulars. Such is the character of the provision in question. In general terms, it excludes sectarian instruction, and the exclusion includes all forms of such instruction. Its force would or might have been weakened had the attempt been made to specify therein all the methods by which such instruction may be imparted. We have a statute upon this general subject which must not be overlooked. Section 3, c. 251, Laws 1883, amending Section 514, Rev. St., provides that in cities "no text-books shall be permitted in any free public schools which will have a tendency to inculcate sectarian ideas." Of course, this applies to the public schools of the city of Edgerton. This statute certainly emphasizes the Constitutional prohibition, although it may not

extend its scope. It is, in effect, a legislative declaration that the use of text-books which have "a tendency to inculcate sectarian ideas" is sectarian instruction, prohibited by the Constitution. For the reasons above stated, we cannot doubt that the use of the Bible as a text-book in the public schools, and the stated reading thereof in such schools, without restriction, "has a tendency to inculcate sectarian ideas," and is sectarian instruction, within the meaning and intention of the Constitution and the statute.

VII. The answer of the respondent states that the relators' children are not compelled to remain in the school-room while the Bible is being read, but are at liberty to withdraw therefrom during the reading of the same. For this reason it is claimed that the relators have no good cause for complaint, even though such reading be sectarian instruction. We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the Constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.

VIII. The foregoing views render unnecessary any extended discussion of the question whether such reading of the Bible is or may be a violation of the rights of conscience, guaranteed by Section 18 of the Bill of Rights. (Article 1, Const.) There has been considerable discussion concerning the limitations of that right. That there are limitations thereto must be conceded. For example, a Mormon may believe that the practice of polygamy is a religious duty; yet no court would regard his conscience in that behalf for a moment, should he put his belief into practice. The petition alleges that, in addition to their objections to the King James Version, the relators have conscientious scruples against the read-

ing of any version of the Bible to their children, either in the district schools or elsewhere, without authoritative note, comment, or exposition, because the practice may lead their children to adopt dangerous errors, and irreligious faith, practice, and worship. When we remember that wise and good men have struggled and agonized through the centuries to find the correct interpretation of the Scriptures, employing to that end all the resources of great intellectual power, profound scholarship, and exalted spiritual attainment, and yet with such widely divergent results; and, further, that the relators conscientiously believe that their church furnishes them means, and the only means of correct and infallible interpretation—we can scarcely say their conscientious scruples against the reading of any version of the Bible to their children, unaccompanied by such interpretation, are entitled to no consideration. But, however this may be, it may safely be said, and nothing further need be said upon the subject, than that when a man's conscience coincides with the law, and he obeys its dictates, he will be protected.

IX. Whether the reading of the Bible in the public schools is religious worship, and whether it constitutes the school-house, for the time being, a place of worship, and, if so, whether such reading during school hours, as a school exercise, against the consent of a tax-payer, compels him to support a place of worship, within the meaning of Section 18 of the Bill of Rights, are questions which will not be here discussed. These questions are considered in an opinion by Mr. Justice CASSODAY filed herewith.

X. A number of cases in different States, supposed to have a bearing upon the main question here considered and determined, have been cited, and quotations made therefrom at considerable length by the respective counsel, and by the Circuit Judge in his elaborate opinion overruling the demurrer to the answer. None of the States in which those decisions were made seem to have in their Constitutions a direct prohibition of sectarian instruction in the public schools. It is believed that this State was the first which expressly embodied the prohibition in its fundamental law, and we are not aware of any direct adjudication of the question under consideration

by any court previously to Judge BENNETT's decision in this case, except (as we are informed) the late Judge STEWART decided, in some case before him in the Circuit Court of Sauk county (but at what time we are not advised), that the Constitution prohibits the reading of the Bible in the district schools. Practically, therefore, we are now determining a question of first impression, and it must be determined upon general principles of law. Cases from which only mere inferences, more or less remote, can be deduced, afford but little aid to correct judgment in this case. Hence the cases cited have not been specially referred to in this opinion. Some of them are nearer in point on the question considered by Mr. Justice CASSODAY, and he has referred to and commented upon them in his opinion, *infra*.

XI. The drift of some remarks in the argument of counsel for the respondent, and perhaps, also in the opinion of Judge BENNETT, is, that the exclusion of Bible reading from the district schools is derogatory to the value of the Holy Scriptures, a blow to their influence upon the conduct and consciences of men, and disastrous to the cause of religion. We most emphatically reject these views. The priceless truths of the Bible are best taught to our youth in the church, the Sabbath and parochial schools, the social religious meetings, and, above all, by parents in the home circle. There, these truths may be explained and enforced, the spiritual welfare of the child guarded and protected, and his spiritual nature directed and cultivated, in accordance with the dictates of the parental conscience. The Constitution does not interfere with such teaching and culture. It only banishes theological polemics from the district schools. It does this, not because of any hostility to religion, but because the people who adopted it believed that the public good would thereby be promoted, and they so declared in the preamble. Religion teaches obedience to law, and flourishes best where good government prevails. The Constitutional prohibition was adopted in the interest of good government; and it argues but little faith in the vitality and power of religion to predict disaster to its progress because a Constitutional provision, enacted for such a purpose, is faithfully executed.

The order of the Circuit Court overruling the demurrer of the relators to the answer to the school board must be reversed, and the cause remanded, with directions to that Court to give judgment for the relators on the demurrer, awarding a peremptory writ of *mandamus*, as prayed in the petition.

CASSODAY, J. (*concurring*.) The gravity of the questions involved in this case are fully appreciated. They have received the careful consideration of all the members of the Court. The writing of the formal opinion has fallen to the lot of Mr. Justice LYON. At his suggestion, a separate presentation of one branch of the case is here made. Before entering upon its direct discussion, however, but as leading to it, a few general observations may not be wholly unprofitable. It is undoubtedly true, as once observed by Mr. Justice BALDWIN that, "in the construction of the Constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief, and the remedy:" *Rhode Island v. Massachusetts* (1838), 12 Pet. (37 U. S.) 723.

A few years later, Mr. Justice STORY said:

"Perhaps the safest rule of interpretation, after all, will be found to be, to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each, just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed:" *Prigg v. Pennsylvania* (1842), 16 Pet. (41 U. S.) 610, 611.

These observations were, of course, made with reference to our Federal Constitution, but they are equally applicable to our State Constitution. In so far as the rules there suggested may aid in the construction of the provisions of our Constitution here involved, they may properly be invoked. It is probably in this view that counsel have dwelt so extensively upon the history of the Christian church, and its *status* under different charters and constitutions; although much of it has a very remote, if any, bearing upon the questions here presented.

All are familiar with the fact that the Jews, in the time of the apostles, were divided into "the sect of the Sadducees," and "the sect of the Pharisees." Paul declared, in the pres-

ence of Agrippa, "that, after the straitest sect" of their religion, he had "lived a Pharisee;" and, when Tertullus charged him with being "a ringleader of the sect of the Nazarenes," he boldly confessed "that after the way which they" called "heresy," or, as the new version has it, "a sect," he had worshiped or served the God of his fathers; and afterwards, to the "chief of the Jews" at Rome, he discoursed "concerning this sect," and persuaded "them concerning Jesus, both from the law of Moses and from the prophets." Of course, "the sect of the Nazarenes" subsequently acquired the more honorable name of "Christians." As the centuries rolled on, and Christians became more numerous, disputes arose among themselves, from time to time, in matters of faith, doctrine, practice, and interpretation of certain passages of Scripture; and these led to repeated divisions and subdivisions, until the different sects of Christians became very numerous. There is no purpose here of indicating that the Holy Scriptures,—the Old and New Testament,—if considered as a whole, and fully comprehended, would exclude from the promises therein contained any of the human race complying with the essential conditions therein prescribed; but since every translation made by man must be more or less imperfect, and since the application of particular passages is liable to be made with partial apprehension, and biased, or even distorted, judgment, it is easy to perceive how texts of Scripture may be read with such an emphasis and tone as to become excessively sectarian.

While the members of any particular sect may be willing to have one of their own number read the Bible in the public schools, yet they are not always willing to concede the same to a member of a sect believing in an opposite faith or doctrine. But the law is impartial, and has given no rights to any one sect that is not equally secured to every other. The relation of the church to the Scriptures has been a subject of controversy ever since the Reformation. Upon that question, even Protestants have differed. Some have gone so far as to say that "the Bible, and the Bible only, is the religion of Protestants;" while others have declared that "the living church is more than the dead Bible, for it is the Bible, and something

more." The relations of Church and State have been the subject of discussion for many centuries ; and at certain times, and in certain nations of Europe, one particular sect has been the established church of the State, and at other times, or in other nations, the belief of some other sect has been the established religion ; while other sects, not so favored, were either exterminated altogether, or permitted to remain on conditions more or less disagreeable and humiliating. These discriminations naturally generated bitterness, enmities, and even cruel war among brethren. Many of the early immigrants to this country had felt the despotism of such intolerance, and came hither in consequence of it. They came from different countries of Europe, and, consequently, had experienced different types of intolerance. Some of them were as narrow minded, in such matters, as their oppressors had been ; and hence no sooner acquired civil power than they themselves became intolerant towards all sects except their own. Such divisions, controversies, and contentions among professing Christians were supposed by many to be repugnant to the sublime teachings and fraternal spirit revealed to the world through Jesus Christ.

Many of the colonists, especially when they came to the formation of State governments, proved to be sufficiently broad and liberal to exact nothing for themselves nor their particular sect that they were unwilling to grant to every other citizen and his particular sect. This benign spirit seemed to extend, as its wisdom became more manifest by experience. True, the Constitution of South Carolina, adopted in 1778, declared that the " Christian Protestant religion " was the " established religion " of that State ; but that was modified in 1790 so as to secure freedom, and prevent discrimination or preferences, in worship or religion. The Constitution of North Carolina of 1776 excluded from office all non-believers in the Protestant religion, or the divine authority of the Old or New Testament ; while the Constitution of Delaware of the same year, made every official subscribe to a confession of faith ; but that was abrogated 16 years afterwards, and equal protection was extended to all sects. So the first Constitutions of Maryland, Massachusetts, and New Hampshire, and,

later, of Connecticut, provided for the support, by taxation or otherwise, of the Christian, or Protestant Christian religion, with more or less toleration guaranteed to other sects. Such direct sanction and toleration seem to have been inspired by a lingering attachment for, or a sympathy with, the European theory of union between Church and State. But the several States of New Jersey, New York, Pennsylvania, Vermont, and Virginia from the first, and, later, Maine and Rhode Island, of the New England States, and every, or nearly every, State admitted into the Union after the organization of the federal government, expressly secured, in effect, in their respective State Constitutions, the equal freedom of every religious sect, organization, and society, with a guarantee against preference or discrimination. So firm had become the public conviction in favor of a broad liberality and equal protection in such matters, at the time of the organization of our national government, that although the Federal Constitution, as originally adopted, did not mention or refer to the subject, yet the first session of the first congress proposed the first amendment to that instrument, prohibiting congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof," notwithstanding no power had therein been granted to enact such a law, and no such law could be legally enacted without such grant of power first being made.

The learned counsel for the school board contends, in effect, that the third of the "articles of compact between the original States and the people and States" carved out of the old "North-West Territory" is still in force in Wisconsin; and that under it this State is required and bound to directly foster and encourage "religion" through schools and education. Assuming such to be the meaning of the article,—which is, to say the least, debatable,—still it is only necessary here to say, in addition to what is said by my associate, that by the adoption of our State Constitution, and the admission of the State into the Union, that article became superseded, and ceased to be longer in force. This has, in effect, been firmly settled by the repeated decisions of the Supreme Court of the United States: *Pollard v. Hagan* (1845), 3 How. (44 U. S.) 212; *Permoli v. First*

Municipality (1845), Id. 609; *Strader v. Graham* (1850), 10 Id. (51 U. S.) 94, 97; *Escanaba Co. v. Chicago* (1883), 107 U. S. 678; *Cardwell v. Bridge Co.* (1885), 113 Id. 205; *Huse v. Glover* (1886), 119 Id. 543; *Sands v. Improvement Co.* (1887), 123 Id. 288; *Bridge Co. v. Hatch* (1888), 125 Id. 6.

The question, therefore recurs, whether the provisions of our State Constitution here involved, when construed with reference to the evils, or supposed evils, thereby sought to be suppressed, and the object or purpose thereby sought to be secured, permitted or prohibited the stated reading of the Bible as a textbook in the public schools. Wisconsin, as one of the later States admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population, as mentioned in the opinion of my associate, has, in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society, than any other State in the Union. Our State Constitution expressly prohibits any religious test as a qualification for office, or the exclusion of any witness in consequence of his religious opinion. (Section 19, art. 1.) Aside from the clause just referred to, and the one against sectarian instruction, so fully considered by my Brother LYON, our State Constitution provides that—

"(1) the right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; (2) nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; (3) nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; (4) nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." (Section 18, art. 1.)

The decisions of Courts in States having no such constitutional prohibition, of course can have no application to the case at bar. The question thus presented is not one of sectarian predilection, nor of religious belief, nor of theological conception, nor of sentiment, but one of fundamental law. It is no part of the duty of this Court to make or unmake, but simply to construe this provision of the Constitution. All questions of political and governmental ethics, all questions of policy, must be regarded, as having been fully considered by

the convention which framed, and conclusively determined by the people who adopted, the Constitution more than 40 years ago. The oath of every official in the State is to support that Constitution as it is, and not as it might have been : *Railroad Co. v. Taylor Co.* (1881), 52 Wis. 58 ; *Lake Co. v. Rollins* (1889), 130 U. S. 672. That oath is to be kept sacred, with strict integrity of purpose, and without any sectarian, religious, or political bias or equivocation.

In considering the meaning of the section of the Constitution quoted, we are to remember that canon of construction adverted to by my associate, and aptly expressed by MARSHALL, C. J., in these words :

"Although the spirit of an instrument, especially of a Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation." *Sturges v. Crowninshield* (1819), 4 Wheat. (47 U. S. 202)

Similar expressions have come to us from the same Court within a year :

"If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it : " *Lake Co. v. Rollins* (1889), 130 U. S. 670.

The first and third clauses of the section of the Constitution quoted are similar in their scope, and may therefore be considered together. They read :

"(1) The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed ; * * * (3) nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment or modes of worship."

This language is quite similar to, and may have been taken in part from, the Constitution of Pennsylvania, as well as other States. In commenting upon a similar clause in the Pennsylvania Constitution, in the celebrated Girard Will Case (*Vidal v. Girard's Ex'rs.* (1848,) 2 How. (43 U. S.), 198), Mr. Justice STORY, speaking for the whole Court, observed :

"Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that, although Christianity be a part of the common law of the State, yet it is so in this qualified sense that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the supreme court of Pennsylvania in *Updegraph v. Comm.* (1824), 11 Serg. & R. (Pa.) 394."

In commenting upon a similar clause in the Ohio Constitution, Mr. Justice THURMAN, speaking for the whole Court, said:

"We sometimes hear it said that all religions are tolerated in Ohio; but the expression is not strictly accurate. Much less accurate is it to say that one religion is a part of our law, and all others only tolerated. It is not by mere toleration that every individual here is protected in his belief or disbelief. He reposes not upon the leniency of government, or the liberality of any class or sect of men, but upon his natural, indefeasible rights of conscience, which, in the language of the Constitution, are beyond the control or interference of any human authority." *Bloom v. Richards* (1853), 2 Ohio St. 390.

In considering the two clauses quoted from our Constitution, we are to bear in mind the general proposition conceded by all, that our State Constitution is not a grant, but a limitation, of powers. *State v. Forest Co.* (1889), 74 Wis. 415. Viewed in this light, and it will readily be perceived that these clauses operate as a perpetual bar to the State, and each of the three departments of the State government, and every agency thereof, from the infringement, control or interference with the individual rights of every person, as indicated therein, or the giving of any preference by law to any religious sect or mode of worship. They presuppose the voluntary exercise of such rights by any person or body of persons who may desire, and by implication guarantee protection in the freedom of such exercise. We neither have, nor can have, in this State, under our present Constitution, any statutes of toleration, nor of union, directly or indirectly, between Church and State, for the simple reason that the Constitution forbids all such preferences and guarantees all such rights. But the exercise of such rights by one person, or any given number of persons, cannot be so extended as to interfere with the exercise of similar rights by other persons, nor so far as to prevent the legitimate exercise of the police powers of the State in pre-

serving order, securing good citizenship, the administration of law, and the Sabbath as a day of rest: *Stansbury v. Marks* (1793), 2 Dall. (2 U. S.) 213; *Comm. v. Wolf* (1817), 3 Serg. & R. (Pa.) 48; *Comm. v. Leshner* (1828), 17 Id. 155; *McGatrick v. Wason* (1855), 4 Ohio St. 566; *Simon v. Gratz* (1831), 23 Amer. Dec. 33; *Shover v. State* (1850), 10 Ark. 259; *Ferriter v. Tyler* (1876), 48 Vt. 469; *State v. Judge* (1887), 39 La. An. 133. Such statutes come within no Constitutional prohibition, and are founded upon an impregnable basis. The two clauses mentioned recognize the existence of different religious establishments or sects, and different modes of worship; but they do not have so direct a bearing upon the question here presented as the second and fourth clauses, which will now be considered.

The second clause of the section quoted is to the effect that no man shall "be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent." Is the stated reading of the Bible in the public schools, as a text-book, "worship," within the meaning of this clause? As indicated in the clauses already considered, the word "worship," as here used, includes any and every mode of worshipping Almighty God. Webster has defined it as—

"The act of paying divine honors to the Supreme Being; religious reverence and homage; adoration paid to God, or a being viewed as God. * * * 'The worship of God is an eminent part of religion, and prayer is a chief part of religious worship.'"

Worcester defines it as—

"(3) Adoration; a religious act of reverence; honor paid to the Supreme Being, or by heathen nations to their deities. 'Worship consists in the performance of all those external acts, and the observance of all those rites and ceremonies, in which men engage with the professed and sole view of honoring God. * * * They join their vocal worship to the quire of creatures wanting voice.' * * *

(4) Honor; respect; civil deference."

The Imperial defines it as—

"(4) Chiefly and eminently, the act of paying divine honors to the Supreme Being; or the reverence and homage paid to Him in religious exercises, consisting in adoration, confession, prayer, thanksgiving, and the like."

The Bible Dictionary declares that—

"The worship of God, both spiritual and visible, private and public, by individuals, families and communities * * * is abundantly commanded in His word."

In theology, we are told that—

"The honor which is due in a peculiar sense to God consists, supremely, in religious worship, in making Him the object of our supreme affection, and rendering to Him our supreme obedience." 1 Dwight's Theo. 555.

Certainly, the reading of the holy scriptures, as the eternal word of God, in obedience to the often-repeated injunction therein contained, whether by the individual in private, or in the family, or in the public assembly, is an essential part of divine worship. Every sermon is based upon some text of scripture. Most prayers are preceded by the reading of some passage of scripture, as an intelligent guide to the thoughts of the worshiper or worshipers. The sermon on the mount contains the prayer taught by the blessed Lord. Is it possible for any genuine believer in the Christian religion to read or listen to the reading of that sermon, and especially that prayer, without being filled with a holy sense of honor, reverence, adoration, and homage to Almighty God, which is the very essence of worship? We must hold that the stated reading of the Bible in the public schools as a text-book may be "worship" within the meaning of the clause of the Constitution under consideration. If, then, such reading of the Bible is worship, can there be any doubt but what the school-room in which it is so statedly read is a "place of worship," within the meaning of the same clause of the Constitution? Counsel seem to argue that such place of worship should be confined to some church edifice, or place where the members of a church statedly worship. Some of the earlier Constitutions having similar clauses, used the words "building" and "church." Manifestly, the words "place of worship" were advisedly used, as applicable to any "place" or structure where worship is statedly held, and which the citizen is "compelled to attend," or the tax-payers are compelled "to erect or support." The mere fact that only a small fraction of the school hours is devoted to such worship in no way justifies such use, as against an objecting tax-payer. If the right be conceded, then the length of time so devoted becomes a matter of discretion. If such right does not exist, then any length of time, however short, is forbidden.

The relators, as tax-payers of the district, were compelled to

aid in the erection of the school building in question, and also to aid in the support of the school maintained therein. (Sections 430, 430a, San. & B. Ann. St.) Being thus compelled to aid in such erection and support, they have a legal right to object to its being used as a "place of worship." In fact, it has been held that it can be devoted to no other use, as against an objecting tax-payer. *School Dist. v. Arnold* (1867), 21 Wis. 657. In that case a temperance society obtained permission from a majority of the electors present at a school meeting, duly called, to hold its meetings in the school-house; but it was held that such electors had no authority to thus divert its use. The present chief justice, speaking for the Court, among other things said—

"The statute has not given the board, nor the electors of the district, any authority to permit a school-house to be used for a meeting of the Sons of Temperance, or anything of the kind. So the action of the electors of the district * * * was wholly unauthorized and furnished no defense to the action."

To the same effect are *Spencer v. School-Dist.* (1875), 15 Kan. 259; *Dorton v. Hearn* (1878), 67 Mo. 301; *Scofield v. School Dist.* (1858), 27 Conn. 499; *Weir v. Day*, (1878), 35 Ohio St. 143. There are cases of a contrary import, but it is very certain that, as against an objecting tax-payer, such school-house cannot be devoted to a use expressly forbidden by the Constitution of the State; as, for instance, as a place of worship.

There is another feature of the clause we are considering which requires attention. Under our statutes the children of the relators, between certain ages, were bound to attend some public or private school for a certain period of each year: (Section 489a, San. & B. Ann. St. chapter 121, Laws 1879; chapter 298; Laws 1882, chapter 73; Laws 1887), superseded by section 489b (San. & B. Ann. St. chapter 519, Laws 1889). In the case of a poor man, incapable of educating his children at private expense, they are "compelled to attend" such school without the consent of themselves or their parents, notwithstanding it is, in a limited sense, a place of worship; and in the case of men of property it might impose an unauthorized burden. This, as we understand, is prohibited by the clause of the Constitution we are considering.

The fourth clause of the section of the Constitution quoted

declares, in effect, that no money shall "be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." As argued by the learned counsel for the school board, the word "treasury," in this clause probably refers to the State treasury. But we are to remember that the school in question receives annually from the State treasury its proportionate share, not only of the school fund income, (section 554, Rev. St.; section 3, c. 124, Laws 1885; and chapter 277, Laws 1887) but also of the one-mill tax (section 1070a, San. & B. Ann. St.; chapter 287, Laws 1885). The question thus recurs whether the money thus drawn from the State treasury for the maintenance and support of the schools in question is for the benefit of a religious seminary, within the meaning of this clause of the Constitution. A seminary is defined by Webster as—

"A place of training; institution of education; a school, academy, college, or university, in which young persons are instructed in the several branches of learning which may qualify them for their future employments."

It manifestly includes institutions of learning or education of different grades. But a religious seminary of any one grade is just as effectually forbidden as a religious seminary of any higher or other grade. The thing that is prohibited is the drawing of any money from the State treasury for the benefit of any religious school. If the stated reading of the Bible in the school as a text-book is not only, in a limited sense, worship, but also instruction, as it manifestly is, then there is no escape from the conclusion that it is religious instruction; and hence the money so drawn from the State treasury was for the benefit of a religious school, within the meaning of this clause of the Constitution.

The Constitutions of Massachusetts, New Hampshire, and some other States differ so widely from ours as to make the adjudications in those States almost wholly inapplicable to the question here presented. It is conceded that no decision has been found, under Constitutional provisions like ours, squarely sustaining the ruling of the learned trial Court. Some things have been said in some of the cases cited, arising under somewhat similar Constitutional provisions, that may seem to support it. Among these are *Donahoe v. Richards* (1854), 38 Me. 379;

Ferriter v. Tyler (1876), 48 Vt. 444; *Moore v. Monroe* (1884), 64 Iowa, 367; *Millard v. Board* (1887), 121 Ill. 297. The Maine case, largely involving other considerations, is based, in part, upon decisions under Constitutions widely differing from ours, and was decided under a Constitution containing none of the provisions upon which especial stress is here laid. The same is partially true of the Vermont case. The same is true in a limited sense of the Iowa and Illinois cases, and in neither of which is any adjudication cited. The following cases seem to be in harmony with the conclusions we have reached: *State v. Hallock* (1882), 16 Nev. 373; *Board v. Minor* (1872), 23 Ohio St. 211; *State v. White* (1882), 82 Ind. 278; *Spencer v. School-Dist.*, *supra*; *Dorton v. Hearn*, *supra*; *Scofield v. School-Dist.*, *supra*; and *Weir v. Day*, *supra*. They are, moreover, in harmony with prior decisions of this Court: *Morrow v. Wood* (1874), 35 Wis. 59; *School-Dist. v. Arnold*, *supra*. In the Nevada case, the decision was adverse to the use of the Catholic Bible. We deem it unnecessary to enter upon an extended analysis of the numerous adjudications cited, since the Constitutional provisions here involved rest upon us with an imperative command. The unanimous result of our deliberations is as directed by Mr. Justice LYON.

ORTON, J. I must fully and cordially concur in the decision and in the opinions of Justices LYON and CASSODAY in this case. It is not needful that any other opinion should be written, but I thought it proper to state briefly some of the reasons which have induced such concurrence in the decisions:

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship; * * * nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship." Const. art. 1, § 18.

"No religious test shall ever be required as a qualification for any office of public trust under the State, and no person shall be rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion." Id. § 19. The interest of the school fund, "and all other revenues derived from the school lands, shall be exclusively applied," etc., "to the support and maintenance of common schools in each school-district," etc. Id. art. 10, § 2, subd. 1. "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and

such schools shall be free, and without charge for tuition, to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein." *Id.* § 3. "Each town and city shall be required to raise by tax annually for the support of common schools therein a sum not less," etc. *Id.* § 4. "Provision shall be made by law for the distribution of the income of the school fund among the several towns and cities of the State for the support of common schools therein," etc. *Id.* § 5.

These provisions of the Constitution are cited together to show how completely this State, as a civil government, and all its civil institutions, are divorced from all possible connection or alliance with any and all religions, religious worship, religious establishments, or modes of worship, and with everything of a religious character or appertaining to religion; and to show how completely all are protected in their religion and rights of conscience, and that no one shall ever be taxed or compelled to support any religion or place of worship, or to attend upon the same, and more especially to show that our common schools, as one of the institutions of the State created by the Constitution, stand, in all these respects, like any other institution of the State, completely excluded from all possible connection or alliance with religion or religious worship, or with anything of a religious character, and guarded by the Constitutional prohibition that "no sectarian instruction shall be allowed therein." They show, also, that the common schools are free to all alike, to all nationalities, to all sects of religion, to all ranks of society, and to all complexions. For these equal privileges and rights of instruction in them, all are taxed equally and proportionately. The constitutional name, "common schools," expresses their equality and universal patronage and support. Common schools are not common as being low in character or grade, but common to all alike, to everybody, and to all sects or denominations of religion, but without bringing religion into them. The common schools, like all other institutions of the State, are protected by the Constitution from all "control or interference with the rights of conscience," and from all preferences given by law to any religious establishments or modes of worship. As the State can have nothing to do with religion except to protect every one in the enjoyment of his own, so the common schools can have nothing to do with religion in any respect whatever.

They are as completely secular as any of the other institutions of the State, in which all the people alike have equal rights and privileges. The people cannot be taxed for religion in schools more than anywhere else. Religious instruction in the common schools is as clearly prohibited by these general clauses of the Constitution as religious instruction or worship in any other department of State supported by the revenues derived from taxation.

The clause that "no sectarian instruction shall be allowed therein" was inserted *ex industria* to exclude everything pertaining to religion. They are called by those who wish to have not only religion, but their own religion, taught therein, "Godless schools." They are Godless, and the educational department of the government is Godless, in the same sense that the executive, legislative, and administrative departments are Godless. So long as our Constitution remains as it is, no one's religion can be taught in our common schools. By religion I mean religion as a system, not religion in the sense of natural law. Religion in the latter sense is the source of all law and government, justice and truth. Religion, as a system of belief, cannot be taught without offense to those who have their own peculiar views of religion, no more than it can be without offense to the different sects of religion. How can religion, in this sense, be taught in the common schools, without taxing the people for or on account of it? The only object, purpose, or use for taxation by law in this State must be exclusively secular. There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution, and war, and all evil in the State, as religion. Let it once enter into our civil affairs, our government would soon be destroyed. Let it once enter into our common schools, they would be destroyed. Those who made our Constitution saw this, and used the most apt and comprehensive language in it to prevent such a catastrophe.

It is said, if reading the Protestant version of the Bible in school is offensive to the parents of some of the scholars, and antagonistic to their own religious views, their children can retire. They ought not to be compelled to go out of the school for such a reason for one moment. The suggestion

itself concedes the whole argument. That version of the Bible is hostile to the belief of many who are taxed to support the common schools, and who have equal rights and privileges in them. It is a source of religious and sectarian strife. That is enough. It violates the letter and the spirit of the Constitution. No State Constitution ever existed that so completely excludes and precludes the possibility of religious strife in the civil affairs of the State, and yet so fully protects all alike in the enjoyment of their own religion. All sects and denominations may teach the people their own doctrines in all proper places. Our Constitution protects all, and favors none. But they must keep out of the common schools and civil affairs.

It requires but little argument to prove that the Protestant version of the Bible, or any other version of the Bible, is the source of religious strife and opposition, and opposed to the religious belief of many of our people. It is a sectarian book. The Protestants were a very small sect in religion at one time, and they are a sect yet, to the great Catholic Church, against whose usages they protested, and so is their version of the Bible sectarian, as against the Catholic version of it.

The common school is one of the most indispensable, useful, and valuable civil institutions this State has. It is democratic, and free to all alike, in perfect equality, where all the children of our people stand on a common platform, and may enjoy the benefits of an equal and common education. An enemy to our common schools is an enemy to our State Government. It is the same hostility that would cause any religious denomination that had acquired the ascendancy over all others, to remodel our Constitution, and change our Government, and all of its institutions, so as to make them favorable only to itself, and exclude all others from their benefits and protection. In such an event, religious and sectarian instruction will be given in all schools. Religion needs no support from the State. It is stronger and much purer without it.

This case is important and timely. It brings before the Courts a case of the plausible, insidious, and apparently innocent entrance of religion into our civil affairs, and of an assault upon the most valuable provisions of the Constitution. Those provisions should be pondered and heeded by all of our people,

of all nationalities, and of all denominations of religion, who desire the perpetuity, and value the blessings, of our free Government. That such is their meaning and interpretation no one can doubt, and it requires no citation of authorities to show. It is religion and sectarian instruction that are excluded by them. Morality and good conduct may be inculcated in the common schools, and should be. The connection of Church and State corrupts religion, and makes the State despotic.

This case is of more than usual interest. It suggests to the American public for consideration, questions of the first importance as to the function of the State in relation to religion under our systems of constitutional government. Since the celebrated case of *Minor v. The Board of Education* (1872), 23 Ohio St. 211, no case has arisen to which general attention has been directed on the subject of the constitutional aspects of the Bible in the public schools. This would appear strange in view of the unwearied assertion of the rights of the individual before the law that has marked the last two decades, did we not consider that the American citizen, with all his radicalism of thought, is conservative to the last degree as to his institutions. The use of the Bible in the public schools has so long been considered a matter of fact in most of the communities throughout the land, that many people create for themselves a "statute of limitations" against any proposition looking to its displacement. But to the assertion of constitutional rights there is no bar, and sooner or later, notwithstanding the dominance of custom, it is safe to say all the States will be obliged to consider, in at least some of their aspects, the questions raised by the principal case. The Supreme Court of Wisconsin deserves well of the American people for its dignified and careful discussions embodied in the three opin-

ions printed above, and it is to be expected that its views will aid the Courts of the Union very materially in reaching correct conclusions in the premises. It is proposed in this note to collate the authorities upon the subject in hand together with the relevant provisions of the various Constitutions.

The first case of the kind was *Dona-hue v. Richards* (1854), 38 Me. 379. The action was trespass on the case by a child, through her father and next friend, against the superintending school committee, to recover damages for maliciously, wrongfully and unjustifiably expelling her from one of the town schools in Ellsworth, Maine. The plaintiff was fifteen years of age, and was expelled for refusing to read in the school, of which she was a member, the Protestant version of the English Bible, which had previously been ordered to be read therein by the defendants. It was decided that (1) the defendants, acting in good faith as public officers, were not liable in damages for erroneous judgment in matters submitted to their determination. The Act of 1850, C. 193, Art. 5, § 1, established the powers and duties of superintending school committees, "to expel from any school, any obstinately disobedient and disorderly scholar, after a proper investigation of his behaviour, if found necessary for the peace and usefulness of the school: also to restore him to the school, on satisfactory evi-

dence of his repentance and amendment."

(2) By the Act the superintending school committee were also authorized and required "to direct the general course of instruction and what books shall be used in the public schools." This power of selection, vested in the committee by the legislature, was not subject to control by the courts. The committee acting in good faith, might select immoral books and there would be no redress in the courts.

(3) The power to select was enforceable by requiring obedience to the selection.

(4) The constitutional objection was thus considered: The Constitution of the State (Art. 1, Sec. 3) asserted the "unalienable right to worship Almighty God according to the dictates of their own conscience," and provided that "no one should be hurt, molested or restrained in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his conscience." It prohibited the subordination or preference of any sect or denomination to another, being established by law. It forbade religious tests or qualifications for offices or trusts under the State.

The object of the first of these clauses was said to be "to protect all, the Mahomedan and the Brahmin, the Jew and the Christian, of every diversity of religious opinions, in the unrestrained liberty of worship and religious profession, provided the public peace should not thereby be endangered nor the worship of others obstructed. It was to prevent pains and penalties, imprisonment or the deprivation of social or political rights, being imposed as a penalty for religious professions and opinions."

As to the second of the clauses, it was held there was no subordination or preference within the constitutional in-

tendment, since the Bible was not used for instruction in theological doctrines, but all that was alleged was that the art of reading was taught by it. The Court said, "it would be a novel doctrine that learning to read out of one book rather than another, or out of one translation rather than another conceded to be proper, was a legislative preference of one sect to another when all that is alleged is, that the art of reading only was taught, and that without the slightest indication of or instruction in theological doctrines."

The third clause prohibiting religious tests was thus considered: "But no requirements as to belief are made essential to entitle a scholar to the benefits of the common schools of the State. He may be a Jew or Mahomedan, a Catholic or Protestant, he may believe much or little, according to the instructions received at home, and for no such cause is he to be deprived of instruction. The State opposes no test or other impediment for the purpose of debarring any one from the public schools." The claim of the plaintiff was said to be much more liable to the exception that it tended to create the subordination or preference of one sect or denomination over another. "The right of one sect to interdict or expurgate, would place all schools in subordination to the sect interdicting or expurgating." The same right of interdiction might be asserted as to any other book claimed by the authorities of any church to teach religion. "This would give the authorities of any sect the right to annul any regulation of the constituted authorities of the State as to the course of study and the books to be used. It is placing the legislation of the State in the matter of education, at once and forever, in subordination to the decrees and the teachings of any and all sects, when their members conscientiously believe such teachings. It

at once surrenders the power of the State to a government not emanating from the people, nor recognized by the Constitution."

The real inquiry was stated to be "whether any book opposed to the real or asserted conscientious views of a scholar can be legally directed to be used as a school book, in which such scholar can be required to read. * * * It is the claim of an exemption from a general law because it may conflict with the particular conscience." If sound, the Court said, it would operate indefinitely. "As the existence of conscientious scruples as to the reading of a book can only be known from the assertions of the child, its mere assertion must suffice for the exclusion of any book in the reading or in the hearing of which it may allege a wrong to be done to its religious conscience." If the right to exclude an objectionable reading book belonged to one child, it belonged to all, and as to all books. And the effect of the contention, it was concluded, was, that the right of the majority to govern in such matters was handed over to the minority, perhaps a minority of one. Accordingly, the action was not sustained.

The next case was *Spiller v. Inhabitants of Woburn* (1866), 12 Allen (Mass.) 127, (abstract in 6 AMERICAN LAW REGISTER N. S. 315). See note *infra* page 330. The public statutes of Massachusetts (Cap. 44, Sec. 32) provided: "The school committee shall require the daily reading in the public schools of some portion of the Bible, without written note or oral comment; but they shall not require a scholar, whose parent or guardian informs the teacher in writing that he has conscientious scruples against it, to read from any particular version, or to take any personal part in reading; nor shall they direct to be purchased or used in public schools, school books

calculated to favor the tenets of any particular sect of Christians." The Constitution of the State (Part 1, Art. II) contained the clause "No subject shall be hurt, molested or restrained in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience;" and the Public Statutes of the State (Cap. 47, Sec. 10) enacted, "No person shall be excluded from a public school on account of the race, color, or religious opinions of the applicant or scholar." The school committee of Woburn passed an order that the schools of the town should be opened each morning with reading from the Bible and prayer, and that during the prayer each scholar should bow the head, unless his parents requested that he might be excused from doing so. A pupil refused to comply with the order to bow the head, her parents having refused to request that she be excused from doing so. The child was expelled. The action was brought to recover damages for illegal exclusion. The court decided that

(1) The power of the school committee of a town to pass all reasonable rules and regulations for the government, discipline and management of the schools under their general charge and superintendence was clear and unquestionable.

(2) No more appropriate method than the exercise required to be observed, could be adopted of keeping in the minds of both teachers and scholars that one of the chief objects of education, according to Massachusetts statutes, was to impress on the minds of children and youth committed to their care and instruction, the principles of piety and justice, and a sacred regard for truth.

(3) The school committee could not pass an order or regulation requiring pupils to conform to any religious rite

or observance, or to go through with any religious forms or ceremonies, which were inconsistent with or contrary to their religious convictions or conscientious scruples.

(4) But the rule in force did not prescribe an act which was necessarily one of devotion or religious ceremony, but required only quiet and decorum during the religious service with which the school was opened. It did not require the pupil to join in the prayer, and did not even require the bowing of the head if the parent requested, and no objection therefore existed to the reasonableness and validity of the order.

In 1872, the case of *Board of Education of Cincinnati v. Minor, et al.* (1872), 23 Ohio St. 211, came before the Supreme Court of Ohio. The proceedings in the lower court,—the Superior Court of Cincinnati,—(see abstract in 9 AMERICAN LAW REGISTER, N. S. 255) were as follows: The Board of Education had passed two new resolutions: (1) "That religious instruction and the reading of religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati." * * * (2) Repealing the previous rule (in force since 1852) requiring the opening of schools by reading of the Bible and singing. A bill for injunction was brought by certain taxpayers, to enjoin the Board and certain of its members and officers from carrying into effect the two resolutions. Eminent counsel appeared on each side, among whom, on behalf of the Board of Education, was the late Justice MATTHEWS, (of the Supreme Court of the United States), then practicing at the Ohio bar. The ground for the complaint was that the State Constitution provided, (Art. 1, Sec. 7)—"Religion, morality and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws

to protect every religious denomination in the peaceful enjoyment of its own mode of public worship, and to encourage schools and the means of instruction," and (Art. 6, Sec. 2)—"The General Assembly shall make such provisions, by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State." It was contended, (1) That the constitutional provisions required religious instruction in the public schools, and (2) That the requirement was self-operative without the assistance of legislation. The Supreme Court, composed of Judges HAGANS, STOVER, and TAFT, granted the injunction as prayed for, Judge TAFT dissenting. Judge HAGANS, of the majority, advocated the theory previously expounded by Dr. Seelye in the *Bibliotheca Sacra* (Vol. XIII, No. 52), that the State was entitled to use religion for its political value, and to require religious instruction to be given in public institutions, and that, upon this theory, the Constitution of Ohio asserted that religion was necessary to the State; that, therefore, in Ohio religious instruction could not be excluded from the public schools. Judge STOVER, arguing from the recognition of the Bible in the statutes and customs of the State (*e. g.* that the family Bible was exempt from execution, that apprentices and prisoners were to be supplied with Bibles, that ministers were authorized to preach to convicts, and that the Bible was found in Courts of Justice and sworn upon), held that revealed religion, as made known in the Holy Scripture, was that alone that was recognized by the Constitution and legal enactments of the State, and on the postulates of Judge HAGANS' opinion, the Bible could not be legislated against by a Board of Education. Judge TAFT, dissenting, in a vigorous,

and (in the judgment of the writer) unanswerable argument, showed, *inter alia*, (1) That the religion referred to in the Ohio Bill of Rights, was not sectarian religion, but reverence and love toward God and charity toward men; (2) That it did not mean the Protestant Christian religion; (3) That the reading of the Protestant version of the Bible, with the Protestant form of prayer, was an act of worship and was sectarian religious instruction; (4) That under the Ohio Constitution, Protestant Christians, although constituting the majority of the people, were not alone entitled to protection and recognition in the matter of religious instruction and worship in public institutions. For the whole case in the Superior Court, with the arguments of counsel and the opinions of the Judges, see "*The Bible in the Public Schools*" (Robt. Clarke & Co., Cincin., 1870). The Supreme Court, on appeal, reversed the lower court on the following grounds: (1) Religious instruction under the Constitution of Ohio was not required in the public schools; (2) The requirement of the Constitution, whatever it was, was not self-operative so as to bind the Courts without legislation, which had not been had. "The truth is," said the Court "that these are matters left to legislative discretion, subject to the limitations on legislative power, regarding religious freedom, contained in the bill of rights" and the legislature not having acted, the Board of Education could not be compelled to permit the reading of the Bible in the schools. The Court, however, did not fail to consider the religious question on its merits, affirming substantially the propositions of Judge Taft's dissenting opinion in the lower court.

Considering the matter of religion in the schools in its general aspects, the Court said (pp. 248-253): "Properly speaking, there is no such thing as

'religion of State.' What we mean by that phrase is the religion of some individual or sect of individuals, taught and enforced by the State. The State can have no religious opinions; and if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person or class of persons. * * * *Legal Christianity* is a solecism; a contradiction of terms. When Christianity asks the aid of Government beyond mere *impartial protection*, it disowns itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated the better it is for both. * * * If it be true that our law enjoins the teaching of the Christian religion in the schools, surely, then, all the teachers should be Christians. Were I such a teacher, while I should instruct the pupils that the Christian religion was true and all other religions false, I should tell them that the law itself was an *unchristian law*. One of my first lessons to the pupils would show it to be unchristian. That lesson would be: 'Whatsoever ye would that men should do to you, do ye even so to them, for this is the law and the prophets.' I could not look the veriest infidel or heathen in the face, and say that such a law was just, or that it was a fair specimen of Christian republicanism. I should have to tell him that it was an outgrowth of false Christianity and not one of the 'lights' which Christians are commanded to shed upon an unbelieving world. * * * Government is an organization for particular purposes. It is not almighty, and we are not to look to it for everything. The great

bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government."

The only other case of the exact kind was *Moore v. Monroe* (1884), 64 Iowa 367; s. c. 24 AMERICAN LAW REGISTER 252. The case arose on an application for an injunction to prevent the reading or repeating of the Bible, or any part thereof, and to prevent the singing of religious songs in the school. The Iowa code (Sec. 1764) enacted "The Bible shall not be excluded from any school or institution in this State, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian." Held, under this provision, it was a matter of individual option with school teachers as to whether they will use the Bible in school or not. The Constitution of the State (Art. 1, Sec. 3,) declared: "The general assembly shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes or other rates, for building or repairing places of worship or the maintenance of any minister or ministry." Held, this provision did not prevent the use of the Bible in the public schools. The reading of the Bible in school did not make it a place of worship within the meaning of the Constitution.

Said the Court: "The object of the provision, we think, is, not to prevent the use of a public building as a place for offering prayer or doing other acts of religious worship, but to prevent the enactment of law, whereby any person can be compelled to pay taxes for building, or repairing any place, designed to be used distinctively as a place of worship. * * * * It is, perhaps, not

to be denied that the principle carried out to its extreme logical results, might be sufficient to sustain the appellant's position, yet we cannot think that the people of Iowa, in adopting the Constitution had such an extreme view in mind." In answer to the objection that it was compulsory religious exercises, it was said, as in the Massachusetts case, the plaintiff's children were not required to be in attendance at the exercises.

This somewhat hesitating judgment of the Iowa Supreme Court was based upon the principle laid down in the earlier cases of *Townsend v. Hagan* (1872), 35 Iowa 194, and *Davis v. Boget* (1878), 50 Id. 11. In *Townsend v. Hagan*, it was held, the electors of a school district may legally permit the school houses in the district to be used for the purposes of religious worship and Sunday-schools. It was said, those who attend either religious worship on the Sabbath, or select schools, do so voluntarily, and, upon the agreed statement of facts that there was no apprehension or danger of injury to the school houses beyond ordinary wear, or that other property was likely to be injured, the Court thought the electors of the district, in their discretion, could authorize the temporary use of the school building for religious exercises. In *Davis v. Boget*, the constitutional objection was directly raised, and the Court held that the occasional use of the building did not convert it into a place of worship, and there could be no objection by the non-consenting tax-payer, since, in the particular case, indemnity was given against injury from the use of the building.

A contrary view to that of the Court in the above two cases, has been taken in other States. In *Scofield v. Eighth School District* (1858), 27 Conn. 499, an injunction against the use of the school building for religious meetings

and Sunday-schools was granted. In *School District No. 8 v. Arnold* (1867), 21 Wis. 657, against its use for a meeting of the Sons of Temperance; in *Weir v. Day* (1878), 35 Ohio St. 143, against its use for a private school; in *Dorton v. Hearn* (1878), 67 Mo. 30, against its use for a Sunday school; and in *Spencer v. Joint School District No. 6* (1875), 15 Kan. 259, its use for any private purpose was enjoined. The Court said, in the last of these cases, that the use of a public school house for any private purpose, such as the holding of religious or political meetings, * * * is unauthorized by law, and may be restrained at the instance of a tax-payer, and this though a majority of the electors and tax payers of the district assent to such use and an adequate rent is paid therefor.

In Illinois, however, the Iowa decision of *Davis v. Boget* (*supra*), has been followed. In deciding in *Nichols v. School Directors* (1879), 93 Ill. 61, that the temporary use of a school house for religious worship, when not occupied or needed for schools, was not unconstitutional, the Supreme Court of the State said: "Religion and religious worship are not so placed under the ban of the Constitution, that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the State."

These cases as to the use of public school buildings for other than school purposes do not quite touch the specific question in hand. The two cases perhaps nearest in principle, without being exactly in point, are *Millard v. Board of Education* (1887), 121 Ill. 297, and *State of Nevada v. Hallock* (1882), 16 Nev. 373.

In *Millard v. Board of Education*, the public school was held in the basement of a Catholic church. Catholic teachers and pupils were required to

attend at the church and to say mass before the assembling of school, but the board of education did not require it. The Catholic "Angelus" prayer was said by the pupils and teachers when school closed at noon. The prayer was not required by any regulation of the board or rule of the school. It was apparently a voluntary matter among teachers and scholars, which in no manner injured complainant. Held, a bill for injunction against the board of education was properly dismissed. Said the Court: "Had the board of education required any particular religious doctrine to be taught in the public schools, or established any religious exercises, sectarian in character, and complainant's children were required to receive such religious instruction in the school, and conform to the sectarian exercises established, he might have good ground of complaint." It was ruled that the free schools under Illinois law, are institutions provided where all children of the State may receive a good common school education. The schools have not been established to aid any sectarian denomination, or assist in disseminating any sectarian doctrine, and no board of education or school directors have any authority to use the public funds for such a purpose.

The case of *State of Nevada v. Hallock* (*supra*), was an application for a mandamus to compel the State controller to audit and issue his warrant on the State treasurer for expenditures incurred by the Nevada Orphan Asylum, approved by the majority of the board of asylum commissioners, under Act of 1881 appropriating funds for the relief of the several orphan asylums of the State. The controller refused, under Art. XI, Sec. 10, of the Constitution, providing, "No public funds of any kind or character whatever, state, county or municipal, shall be used for sectarian purposes." In this asylum, Catholic

religious services were held. Protestant children were required to be present and were required to kneel, although not to join in the prayers, which were articulated by others. Held, the institution was given its character by the nature of the services. It was sectarian. A religious sect was defined to be "a body or number of persons, united in tenets, but constituting a distinct party by holding doctrines different from those of other sects or people," and every sect of that character was said to be sectarian within the meaning of that word as used in the Constitution." The mandamus was denied. In addition to Art. XI, Sec. 10, there were specific provisions against sectarian instruction as follows: Art. XI, Sec. 2. Any school district which should allow instruction of a sectarian character therein might be deprived of its proportion of the interest of the public-school fund during such neglect or infraction. Art. XI, Sec. 9. No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this Constitution.

It will be observed, that, of the above cases which directly relate to the Bible in the public schools, the Maine case was decided on the ground, that, the Bible was used as a reading book, and not as a book of devotion or instruction in sectarian or religious dogmas; and that therefore the school committee's function of choice of a book, not objected to as unfit for the purpose for which it was used, was not subject to control by the courts. The Massachusetts case treated the ceremony of reading the Bible and prayer as not necessarily a religious exercise, so far as the plaintiff was concerned, because there was no compulsory act of worship or devotion required. The Iowa case is of little significance, because of the absence of any reasons whatever for the judgment rendered, excepting that

implied in the remark that it was not conceived to have been the intention of the framers of the Constitution to have the logical effect of their words insisted upon. The Ohio case was decided principally on the ground that under the State Constitution the use of the Bible in the public schools was not compulsory. The principal case, in deciding, after a careful examination of the questions involved, that the use of the Bible in the public schools was not permissible for purposes of worship or religious instruction, advances upon the decision, while following the argument, in the Ohio case. The Maine case, in upholding the legality of the use of the Bible merely as a reading book is not questioned by the later decisions, but the decision in *Spiller v. Inhabitants of Woburn*, (*supra*) that the reading of the Bible with prayer was not necessarily a religious exercise, is not maintained by the cases in Ohio and Wisconsin, and the principle of the decision was objected to in the cases in Illinois and Nevada. The fact that the attendance during the exercise was not compulsory, was doubtless the basis for the decision in *Spiller's* case. The answer to this as in argument is found in the opinion of Judge LYON, in the Wisconsin case.

The three grounds upon which the judges rested their decisions in the principal case:—that reading from the Bible in the public schools as an opening exercise was (1) a violation of the rights of conscience, (2) compulsory support of a place of worship, (3) sectarian instruction,—are comprehensive, and suggest the lines upon which the argument must be made in the States that have yet to decide the question for themselves. In almost all the discussions as to the constitutionality of the use of the Bible in the public schools, those who defend its use assert the doctrine that Christianity is part of the common

law in the United States (see, for a consideration of this specific proposition, the leading article in this number). Even if the proposition were proven so as to be in any definite sense true, it would not dispose of the constitutional objections to the use of the King James Version of the Bible in the schools. The argument to be of any avail should be directed to proving that *Protestant Christianity* is part of our common law. It is very natural for Protestants to assume that only their conception or conceptions of Christianity and only their translation of the Bible and only their method of using it are right. But politically speaking there is nothing in the Federal or in any of the State Constitutions, with the exception of that of New Hampshire, to justify the assumption. In a civil forum, Roman Catholicism doubtless has the same presumption in its favor as Protestantism. And if neither Roman Catholic nor Protestant Christianity is part of our law in the sense that its dogmas are to be affirmatively maintained by the State, the position of the Jew who denies both forms, and of others who do not rank themselves as either Protestants, Catholics or Jews, would seem entitled to consideration. The conscientious opinions of individuals of any faith or of no faith, are not permitted, of course, to stand in the way of the exercise by the State, of its legitimate functions of government. This is well illustrated in the cases holding that conscientious scruples as to the observance of days must be ignored when they conflict with civil obligations: *Simon's Executors v. Grats* (1831), 2 P. & W. (Pa.) 412; *Ferriter v. Tyler* (1876), 48 Vt. 444. In the former of these cases, the Supreme Court of Pennsylvania held that the conscientious scruples of a Jew to appear in Court, and attend to the trial of his cause on Saturday, the Jewish Sabbath, was no ground for the con-

tinuance of his cause, Chief Justice GIBSON declaring that the course of justice could not be obstructed by any scruple or obligation whatever. In the latter case, the Supreme Court of Vermont maintained the legality of the expulsion of Catholic children from a public school and of the prohibition of their further attendance, after they had, in obedience to the command of their parents and the priest, absented themselves from school, contrary to the rules, on a church festival day.

But the immediate question raised by the principal case is, whether the people of the States have not by constitutional limitations wisely fettered the departments of government, so as to preserve to the minority certain rights of both a positive and a negative kind in the domain of conscience, which the majority can not lawfully impair, and whether the privilege of children to enjoy all the advantages of the public school, without being exposed to what they consider objectionable religious influences, is not one of these rights.

The limits of this note do not permit of an examination of all the cognate questions that may be raised in seeking an answer to the inquiry. The State in many ways recognizes the Bible as the sacred book of the majority of the people, as in the common method of oath-taking, and in exempting the book from liability to levy in execution, in certain cases. The United States and many of the States, in legislation and usage, likewise avail themselves of the religious customs of the majority of the people, based upon the commonly received teachings of the Bible, as in the appointment of army and legislative chaplains, and in having the sessions of some of their deliberative bodies opened with prayer. This is only natural, in view of the pervading and well nigh universal value of the religious instinct, and the fact that the rule of the majority

prevails, and that therefore the customs sanctioned by the majority, other things being equal, would be expected to be incorporated more or less into the people's political life. But specific constitutional limitations, designed for the protection of the minority, are obviously entitled to more weight than either legislation or general custom. And if the letter and the spirit of our constitutional guarantees require the subsidence of custom, even though so valuable or, as many consider, so necessary a book as the Bible lose its place in schools supported by the State, the constitutional guaranty must be upheld.

Upon the general subject, Samuel T. Spear's *Religion and the State* (Dodd, Mead & Co., N. Y., 1876) may be read with profit.

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[Between the decision in *Donahue v. Richards*, by the Supreme Court of Maine in 1854 and that in *Spiller v. Inhabitants*, by the Massachusetts Court in 1866, (*supra*, page 323), there was the interesting case of *Comm. v. Cooke*, in the Police Court of Boston, in April, 1859, and reported 7 AMERICAN LAW REGISTER, O. S. 417. It was an assault and battery case, a teacher having whipped a boy for refusing to recite the Lord's prayer and the Ten Commandments. The School Committee required the pupils to learn, and once a week to recite, the Ten Commandments; the morning exercises were to begin, each day, by reading a portion of Scripture, followed by the Lord's Prayer.

The same arguments were advanced as received favorable consideration in the principal case (especially pages 301-3), and received this answer: "Those who drafted and adopted our Constitution could never have intended it to meet such narrow and sectarian views. That section of the Constitution was clearly intended for higher and nobler purposes.

* * * It was intended to prevent persecution by punishing for religious opinions. The Bible has long been in our common schools. It was placed there by our fathers, not for the purpose of teaching sectarian religion, but a knowledge of God and of his will, whose practice is religion. * * *

But, in doing this, no scholar is requested to believe it, none to receive it as the only true version of the laws of God." MAINE, J., pp. 422, 423.

[Space forbids the insertion at this place, of the various constitutional provisions in all of the States of the Union, but they will soon appear in connection with a leading article on The Constitutional Provisions Relative to Religion and the Deity, in which the action of the people in defining freedom for both the religious and the irreligious will be considered.

[The specific subject of Sunday laws and contracts, with reviews of the legislation and judicial opinions upon the cases arising from violations thereof, has been treated in two leading articles in THE REGISTER: one by J. H. Lind in N. S., Vol. XVII, page 281, and the other by Angelo T. Freedley in N. S., Vol. XIX, pages 137, 209, 273.—ED.]

ABSTRACTS OF RECENT DECISIONS.

BANKS AND BANKING.

Deposit of collaterals with a bank for the purpose of securing certain loans and discounts, does not render the bank a gratuitous bailee, but it is liable for the want of ordinary and reasonable care in the custody of the securities so deposited, until they are redelivered to the owner. *Onderkirk v. Central Nat. Bank*, Ct. App. N. Y., Feb. 25, 1890.

Holder of check cannot sue the bank on which it is drawn, unless it has been accepted by the latter, but where the bank has paid the amount of a check to one who is neither the payee nor indorsee, and has charged it up to the account of the drawer, the bank's conduct amounts to such acceptance as will enable the holder to sue upon the check. *Pickle v. People's Nat. Bank*, S. Ct. Tenn., Jan. 16, 1890.

Knowledge by president of a bank of equities affecting certain notes of a cattle company, in which he is interested, which notes he offers for discount to the directors of the bank, without disclosing the facts, is not imputable to the bank and will not affect the validity of its claim upon the notes. *Corcoran v. Snow Cattle Co.*, S. Jud. Ct. Mass., Feb. 26, 1890.

Raised check was indorsed "for collection" and given to a third party to collect from the bank on which it was drawn; the agent of the former indorsed the check in his own name and the money was paid to such agent and remitted by him who had sent the check for collection before the forgery was discovered; the bank could not recover back from the principal the amount of the check. *Nat. City Bank of Brooklyn v. Westcott*, Ct. App. N. Y., 2d Div., Feb. 25, 1890.

BILLS AND NOTES.

Attorney's fee of ten per cent., when stipulated for in a promissory note, may be recovered, together with the face value of the note, and it is not necessary to prove the value of the attorney's services. *Exchange Bank of Dallas v. Tuttle*, S. Ct. N. M., Jan. 24, 1890.

Contribution cannot be exacted by a surety upon a promissory note from his co-sureties, when the note has been renewed by a new note signed by the principal and the first mentioned surety alone, and the latter has been compelled to pay such new note. *Bell v. Boyd*, S. Ct. Tex., Feb. 25, 1890.

Possession by widow of an unindorsed note, payable to her husband, who owed her money, is not sufficient to establish her right to the note as against his executor, and a renewal note, given by the maker of the original note to the widow in her own name, is the property of the estate. *Buie v. Buie*, S. Ct. Miss., March 10, 1890.

Sale of drafts by one to whom they have been indorsed in blank for the purpose of collection, vests a good title in the purchaser, although the agent has falsely represented that he owned the drafts and has failed to account for the proceeds. *Coors v. German Nat. Bank*, S. Ct. Colo., Feb. 28, 1890.

COMMON CARRIERS.

Butler received by a railroad in summer for shipment South, must be shipped in such manner as to prevent injury by heat, and the railroad's liability is not altered by the fact that it has no refrigerator cars. *Beard v. Illinois Central R. R. Co.*, S. Ct. Iowa, Feb. 10, 1890.

CONSTITUTIONAL LAW.

Territorial statute, prohibiting the exportation of fish from the territory, is an interference with interstate commerce, and consequently void. *Territory v. Evans*, S. Ct. Id., Feb. 24, 1890.

CONTRACTS.

Agreement to sell a brand of cigars to no one in the State except the other party to the contract, and to give him the exclusive agency for such cigars, is not void as being in restraint of trade. *Newell v. Meyendorff*, S. Ct. Mont., Feb. 4, 1890.

CORPORATIONS.

Unpaid instalments upon the capital stock of a corporation, do not, in the absence of a special contract, give the corporation a lien upon the stock for the amount unpaid. *Lankershime Ranch Land and Water Co. v. Herberger*, S. Ct. Cal., Jan. 27, 1890.

CRIMINAL LAW.

Larceny at common law is constituted where a broker, by falsely representing to the consignee of goods that he has secured a purchaser therefor, obtains a delivery order on the carrier, gives the consignee a memorandum containing a fictitious contract of sale on the consignee's account, takes possession of the goods and stores them in his own name, and a sale by him to another than the alleged purchaser passes no title. *Sollau v. Gerdau*, Ct. App. N. Y., Feb. 25, 1890.

DIVORCE.

Cruel treatment by a husband of his wife, which renders her existence intolerable and endangers her life, is not excused by the fact that such treatment is the result of the habitual intoxication of the husband, unless the wife herself has induced or consented to such intoxication. *McVickar v. McVickar*, Ct. Ch. N. J., Feb. 21, 1890.

Excessive use of morphine by means of hypodermic injections, is not drunkenness within the meaning of a statute which makes habitual drunkenness a cause for divorce. *Youngs v. Youngs*, S. Ct. Ill., Nov. 26, 1889.

FIRE INSURANCE.

Assignment of a fire insurance policy to a mortgagee was written by the agent who had solicited the insurance, upon the policy being brought to him by the insured and the mortgagee, and was subsequently approved by the company; afterwards the insured sold the property, and again called to get the policy transferred to

the same mortgagee, but was informed by the agent that such transfer was unnecessary; the company was estopped to set up the non-transfer of the policy on the sale of the property as a defense to an action by the mortgagee. *Phoenix Assurance Co. v. Wachter*, S. Ct. Pa., Feb. 24, 1890.

By-law of a mutual fire insurance company, the effect of which is to limit the company's liability on certain insured property, is binding upon a member of the company who receives a copy of such by-law and makes no objection to it, but continues his membership in the company. *Borgards v. Farmers' Mut. Ins. Co.*, S. Ct. Mich., Feb. 20, 1890.

Giving possession to lessee of insured property, under a contract that he shall buy the property at the termination of the lease, or, at his option, at any time during its continuance, is a breach of a condition that the policy shall become void if any change takes place in the title or possession of the property insured, without notice to, and the consent of, the insuring company. *Smith v. Phenix Ins. Co.*, S. Ct. Cal., March 10, 1890.

Wilful false statement in a proof of loss, rendered after the fire, of some pretended losses, will forfeit the entire policy, which provides that "any fraud, or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claims,"—even though the actual losses may exceed the entire amount of the policy. *Dolloff v. Phenix Ins. Co.*, S. Jud. Ct. Me., Jan. 20, 1890.

JURORS.

Member of Mormon Church cannot be a juror in Idaho, for jurors must have all the qualifications prescribed for electors. *Terriory v. Evans*, S. Ct. Id., Feb. 24, 1890.

LIBEL.

Caricature in a newspaper, purporting to be a design for a monument to a member of the Legislature and capable of no meaning, except that liquor and money were the sources of his success in passing a certain bill, is libelous *per se*, and no innuendo is required. *Randall v. Evening News Assn.*, S. Ct. Mich., Jan. 24, 1890.

Name mentioned in an alleged libelous newspaper article was John F——, which was the actual name of the person claiming to have been libeled, but such person was generally known as John D. F——, and had adopted the middle letter for the express purpose of distinguishing him from other persons of the name of John F——; in the absence of evidence that he was the person intended to be referred to in the article, recovery cannot be had. *Finnegan v. Detroit Free Press Co.*, S. Ct. Mich., Dec. 28, 1889.

LIFE INSURANCE.

Assignment of policy, absolute on its face, by a debtor to his creditor, passes no greater interest to the latter than such sum as will pay the debt, with interest, and whatever premiums may have been paid by the creditor, with interest on the same. *Cawthorn v. Perry*, S. Ct. Tex., March 4, 1890.

MASTER AND SERVANT.

Carpenter, porter and stewardess of a steamship, all of whom have signed shipping articles, are fellow-servants, though the former belongs to that division of the ship's company known as the "deck department," and the latter two to the "steward's department," such divisions being made merely for convenience of administration and the captain being in command of the whole. Quebec Steamship Co. v. Merchant, S. Ct. U. S., March 3, 1890.

MUNICIPAL CORPORATIONS.

Injuries to a pedestrian, received by him without fault on his part, through stumbling over a hydrant owned by a private company, which a city has allowed to be maintained upon its sidewalk in a position dangerous to travelers, will entitle him to recover damages against the city. King v. City of Oshkosh, S. Ct. Wis., Jan. 28, 1890.

MUTUAL BENEFIT INSURANCE.

Insanity is such "sickness or other disability" as will entitle a member of a mutual benefit association to receive benefits. McCullough v. Expressman's Mut. Ben. Assn., S. Ct. Pa., March 10, 1890.

NEGLIGENCE.

Contributory negligence cannot be charged to one, who, having been placed through the negligence of another in a position of danger, does not exercise coolness and presence of mind in his endeavors to escape from such danger. Silver Cord Combination Mining Co. v. McDonald, S. Ct. Colo., Feb. 28, 1890.

NOTARY PUBLIC.

A woman cannot be appointed a notary public under the laws of Massachusetts. Opinion of the Justices, S. Jud. Ct. Mass., March 18, 1890.

OYSTERS.

Natural oyster-bed, as distinguished from artificial, is one not planted by man, in any shoal, reef or bottom where oysters are to be found growing, not sparsely or at intervals, but in a mass or stratum, and in sufficient quantities to be valuable to the public. State v. Willis, S. Ct. N. C., Jan. 14, 1890.

PUBLIC OFFICERS.

Habitual drunkenness, when made by constitutional provision a ground of removal from office, is chargeable to an officer who has been drinking to excess six or eight times a year, at intervals of from one to two months, for over three years, and whose fits of intoxication lasted from one to two days, and once for two or more weeks. State v. Savage, S. Ct. Ala., Feb. 1, 1890.

RAILROADS.

Child, ten years of age, who was lying across a railroad track

just before he was run over, is not chargeable with his own negligence, but recovery for his death is precluded by reason of his trespass. *Pennsylvania R. R. Co. v. McMullen*, S. Ct. Pa., Feb. 3, 1890.

Contributory negligence is not chargeable to a passenger in the caboose of a freight train, who gets up and starts to go out at the sound of a whistle indicating approach to a station and is thrown down by a sudden jerking of the train and injured, unless it is shown that the jerking was so usual that he should have anticipated it. *Lusby v. Atchison, T. & S. F. Ry. Co.*, U. S. C. Ct., D. Colo., Jan. 21, 1890.

Stockholder of a railroad company is not liable for the negligence of the officers, agents or employes of the company in the operation of its road, and it makes no difference that the stockholder is another railroad corporation which lawfully owns a majority of the stock of such company. *Atchison, T. & S. F. R. R. Co. v. Cochran*, S. Ct. Kan., Feb. 8, 1890.

Stumbling over baggage in the aisle of a passenger car, which could have been plainly seen, will not entitle a passenger to damages for the injuries thereby sustained. *Stimson v. Milwaukee, L. S. & W. Ry. Co.*, S. Ct. Wis., Jan. 7, 1890.

Train despatcher of a railroad company, who has absolute control over the running of its trains and is charged with the duty of directing their movements, is not a fellow-servant of the employes in charge of the trains, who are bound to obey his directions. *Hunn v. Michigan Central R. R. Co.*, S. Ct. Mich., Dec. 28, 1889.

Yard switchman is not a fellow-servant with a locomotive engineer. *Louisville & N. R. R. Co. v. Sheets*, Ct. App. Ky., March 13, 1890.

SLANDER.

Words spoken of a public officer, in order to be actionable without averment of special damage, must impute to him some incapacity or lack of due qualification to fill his position, or some positive past misconduct which will injuriously affect him in it, or the holding of principles hostile to the maintenance of the government; when the words spoken simply express the speaker's opinion of the public officer referred to, but do not charge any positive misconduct, special damages must be averred. *Sillars v. Collier*, S. Jud. Ct. Mass., Feb. 25, 1890.

SUNDAY LAWS.

Indictment for running trains on Sunday cannot be sustained against a railroad company in West Virginia; there is no law to warrant such an indictment. *State v. Norfolk & W. R. R. Co.*, S. Ct. App. W. Va., Jan. 29, 1890.

Will made on Sunday is valid, although the testator was in good health at the time. *Rapp v. Reehling*, S. Ct. Ind., Feb. 26, 1890.

TRADE-MARKS.

"*Lightning Hay-Knives*," when used and advertised for years as

the description of knives made by certain manufacturers, who have registered the word "lightning" as a trade-mark, will be protected by injunction against the use of the name "Lightning Pattern Hay-Knives," as the word "lightning" is not merely descriptive of the quality or characteristic of the knives. *Hiram Holt Co. v. Wadsworth*, U. S. C. Ct., N. D. N. Y., Dec. 30, 1889.

Old machines, of another make than his own, may be bought by a manufacturer, repaired, repainted and sold again, without removing the trade-mark put upon them by the original manufacturer. *Singer Mfg. Co. v. Bent*, U. S. C. Ct., N. D. Ill., Dec. 23, 1889.

"*Singer*," the name which has come to publicly identify the special kinds of sewing-machine made by the patentee, Singer, and his successors, cannot, after the expiration of their patent, be protected to the latter as a trade-mark so that they may have the exclusive right to use the name as applied to sewing-machines. *Singer Mfg. Co. v. June Mfg. Co.*, U. S. C. Ct., N. D. Ill., Dec. 23, 1889.

"*Tycoon*," having been in common and general use, as descriptive of a certain class of teas for many years, cannot now be appropriated by a particular dealer as a trade-mark. *Corbin v. Gould*, S. Ct. U. S., Feb. 3, 1890.

WATER-RIGHTS.

Pollution by oil of a spring of water upon an adjoining property to that on which the oil is stored in large quantities, such pollution being caused by the oil leaking from the casks containing it, saturating the ground and penetrating to the hidden veins of water feeding the spring, will entitle the owner of the spring to recover damages from the person thus storing the oil. *Kinnaird v. Standard Oil Co.*, Ct. App. Ky., Jan. 25, 1890.

WILLS.

Contract to make a will, bequeathing all the property of a decedent to an adopted daughter, is not shown by evidence that such decedent, before adopting such daughter and procuring an act of the legislature changing her name and making her capable of inheriting from him, agreed to make her his heir, entered into some written contract with her father, which could not be produced at trial, and afterwards declared that she would have all his property. *Davis v. Hendricks*, S. Ct. Mo., Jan. 27, 1890.

Devise of "all my estate, both real and personal, that I shall inherit as my portion after my father's death," made by a testatrix whose father was living, and whose only estate in land was that inherited by her from her mother, subject to her father's estate by the curtesy, passes her estate in such land. *Graham v. Grugan*, S. Ct. Pa., Feb. 3, 1890.

JAMES C. SELLERS.

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THE RIGHT OF THE FEDERAL COURTS TO PUNISH OFFENDERS AGAINST THE BALLOT BOX.

I.

The propositions advanced in this article may be broadly laid down as follows :—

The Federal Courts have jurisdiction to punish crimes against the ballot box, at Congressional elections: *Ex parte Siebold* (1879), 100 U. S. 371; *Ex parte Yarbrough* (1883), 110 Id. 653.

This rule obtains, even though the offenders had no intention of falsifying the returns, as to the Congressional vote, and did not interfere with them. The reason of this doctrine is, that the entire vote, both for State officers and for Congressmen, must be considered as an unit; hence, an interference with the returns of the State vote, violates the laws of Congress, and the offenders are criminally liable under the statutes of the United States: *In re Coy* (1888), 127 U. S. 731; *In re Coy* (1887), U. S. Circ. Ct., Dist. Indiana, 31 Fed. Repr. 794.

Over other elections, the Federal Courts have no jurisdiction to punish violators of the election laws, except when there is a discrimination on account of race, color, or previous condition of servitude, within the prohibitions of the Fifteenth Amendment: *U. S. v. Reese, et al.* (1875), 92 U. S. 214.

[Since the decision of the Supreme Court of the United States, in *Fitzgerald v. Green* (March 24, 1890), there is doubt

as to the elections where State officers and Presidential electors, or Presidential electors alone, but no Representatives in Congress, are balloted for : *infra*, page 344.

II.

The first Article of the Constitution of the United States provides—

SECTION 2. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such vacancies.

[It would be neither necessary nor profitable to quote the opinions of different writers upon the qualifications of the voters or electors for Representatives, as this is a legal and not a political essay and is intended rather to be an exposition of the various decisions of the Federal courts. Still, a reference to a well-known work will be proper, in view of the authority conceded to it by Chief Justice MARSHALL, especially in *Cohens v. Virginia* (1821), 6 Wheat. (19 U. S.) 264, 419.

The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent upon the Convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper, for the reason just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason ; and for the additional reason, that it would have rendered too dependent on the State governments, that branch of the Federal government which ought to be dependent upon the people alone. To have reduced the different qualifications in the different States, to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the Convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State ; because it is conformable to the standard already established, or which may be established by the State itself. It will be safe to the United States ; because, being fixed by the State Constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their Constitutions, in such a manner as to abridge the rights secured to them by the Federal Constitution : The Federalist, No. 52.

While this Second section of the First Article of the Constitution adopts the qualifications prescribed by the States for a voter at an election for the popular branch of the State legislature, yet Congress has a supervisory power over the subject, under the provisions of the Fourth section of the same Article of the Constitution (*infra*), in order to secure legal and fair elections, a free and safe exercise of the right to vote thereat, and to prevent fraud and violence thereabout. Congress can make altogether new regulations or add to or alter those already made by the State; impose new duties on the State officers of election and provide for the appointment of other officers; and compel the enforcement of State and Federal laws regulating elections. A regulation made by Congress is of superior authority, and any State law repugnant to it is void as to Congressional elections. Congress has plenary and paramount jurisdiction over these elections: *In re Coy* (1888), 127 U. S. 731.

The provision in relation to vacancies in the Representation from any State is enforced by the Revised Statutes—

SEC. 26. The time for holding elections in any State, District or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

[Under these provisions of the Constitution and the Revised Statutes, the Supreme Court of Rhode Island were of opinion that a vacancy caused by the House unseating a member was one to be filled at an election ordered by the Governor; but if the count of the votes established no election, then under a law of Rhode Island the legislature might order a new election, and the Governor, even if he had power under the Constitution of the United States, might wait for the action of the General Assembly so long as it was in session: *In re Representative Vacancy* (1887), 15 R. I. 621; *In re Congressional Elections* (1887), Id. 624, 627.

[The First article of the Constitution also provides—

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years. * * *

SECTION 4. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

[Hamilton, in *The Federalist* (Nos. 59, 60, 61) explains this section, together with the objections which were originally raised against it, by proceeding on the broad ground that every government ought to contain in itself, the means of its own preservation. This principle was yielded in the case of the Senate, chiefly because the autonomy of the States would be endangered; moreover the Senate is a body whose members are classified in terms, whilst the Representatives are to be elected every two years. The present arrangement, Hamilton thought preferable in that it would be more convenient and satisfactory in ordinary cases and when no improper views prevail; so that the intention was to have Federal interference upon extraordinary circumstances, when safety demanded.

[Under this section of the Constitution, Congress enacted—

CHAP. XLVII. *An Act for the appointment of Representatives among the several States according to the Sixth Census.* (Approved June 25, 1842, 5 Stat. at Large 491.)

SEC. 2. *And be it further enacted*, That in every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory, equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative.

[Justice MILLER, in the *Yarbrough* case (*supra*) explains the origin and purpose of this section:—

It was not until 1842, that Congress took any action under the power here conferred, when, conceiving that the system of electing all the members of the House of Representatives from a State by a general ticket, as it was called, that is, every elector voting for as many names as the State was entitled to representatives in that House, worked injustice to other States which did not adopt that system, and gave an undue preponderance of power to the political party which had a majority of votes in the States, however small, enacted that each member should be elected by a separate district, composed of contiguous territory: (110 U. S. 660.)

[Thirty years later, the language of the Act of 1842 was slightly changed, but the sense remained the same, and, in the language of the Act of February 2, 1872 (Section 2, 17 Stat.

at Large 28, as amended by the Act of May 30, 1872, Id. 192) now appears in the Revised Statutes of the United States as—

SEC. 23. In each State entitled under this apportionment to more than one Representative, the number to which such State may be entitled in the Forty-third and each subsequent Congress shall be elected by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants, and equal in number to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative; but in the election of Representatives to the Forty-third Congress in any State to which an increased number of Representatives is given by this appointment, the additional Representative or Representatives, may be elected by the State at large, and the other Representatives by the districts as now prescribed by law, unless the Legislature of the State shall otherwise provide before the time fixed by law for the election of Representatives therein.

[Hamilton discussed the power to pass this statute, in *The Federalist* (Nos. 60 and 61), where he was called upon to meet the objection that the Constitution did not compel the voters to meet in no larger divisions than one county or similar division of the State. The evils of a general ticket were not then apparent.

[Justice MILLER, in the same *Yarbrough* case (*supra*), points out that the election of Representatives in the different States on different days finally appeared to be an evil which Congress remedied by another section of the same Act of February 2, 1872, which is now incorporated into the Revised Statutes as—

SEC. 25. The Tuesday next after the first Monday in November, in the year eighteen hundred and seventy-six, is established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the Forty-fifth Congress; and the Tuesday next after the first Monday in November, in every second year thereafter, is established as the day for the election, in each of said States and Territories, of Representatives and Delegates to the Congress commencing on the fourth day of March next thereafter.

[Commenting upon the appointment of a time for the election of Representatives, Justice MILLER, in the same case, remarked—

Now the day fixed for electing members of Congress has been established by Congress without regard to the time set for election of State officers, in each State, and but for the fact that the State legislatures have, for their own accommodation, required State elections to be held at the same

time, these elections would be held for Congressmen alone at the time fixed by the act of Congress: 110 U. S. 661.

[These last words receive peculiar force from the Act of March 3, 1875, 18 Stat. at Large 400, in which occurs this concession to convenience :—

SEC. 6. That section twenty-five of the Revised Statutes prescribing the time for holding elections for Representatives to Congress, is hereby modified so as not to apply to any State that has not yet changed its day of election, and whose Constitution must be amended in order to effect a change in the day of election of State officers in said State.

[To prevent *viva voce* voting and to make an uniform system of ballots, an amendatory Act to that of May 31, 1870 (16 Stat. at Large 140, "to enforce the right of citizens of the United States to vote"), provided, as now incorporated in the Revised Statutes—

SEC. 27. All votes for Representatives in Congress must be by written or printed ballot; and all votes received or recorded contrary to this Section shall be of no effect. (Act of February 28, 1871, Sect. 19, 16 Stat. at Large 440.)

[The first article of the Constitution also provides—

SECTION 5. Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members.

SECTION 8. The Congress shall have power—

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

[The following remarks by WOODRUFF, J. (*U. S. v. Quinn* (1870), U. S. Circ. Ct., S. Dist. N. Y., 8 Blatchf. 48, 64-5), are of interest in the absence of decisions upon the point :—

We do not think it necessary to rest our views of the constitutionality of the law [section 5512, Rev. Stat. U. S.] upon that [fifth] section, and yet the agreement, to our minds, is plausible in a high degree, if indeed, we ought not to regard it as satisfactory considered alone, namely, that when the Constitution confers upon each house the power to judge of the election returns, and qualifications of its own members and then authorizes Congress to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested in any department of the Government, it authorizes Congress to make such laws touching the conduct of elections and returns, as will operate, first, to furnish to each House of Congress appropriate evidence of the validity of the commission, or appointment of any man who comes there, claiming the right to a seat,

and, second, to prohibit the intervention of any obstacle which might embarrass, or prevent, the exercise of the right of each House to judge the election of any man who claims the right to a seat.

[As a result of the great struggle between the North and the South, the Fourteenth Amendment (ratified in 1868 and proclaimed July 28, 1868) provides :—

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty or property, without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

And two years later, the Fifteenth Amendment (ratified in 1870 and proclaimed March 30, 1870) added that :—

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

III.

The second Article of the Constitution provides (Section one), in relation to the President and Vice-President of the United States that—

Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress. * *

The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes ; which day shall be the same throughout the United States.

[Under this Section, Congress has exercised its constitutional powers in Chapter one, Title Three, of the Revised Statutes, as amended by Act of February 3, 1887 (24 Stat. at Large, page 373), and Act of October 19, 1888 (25 Stat. at Large, page 613). It is, however, unnecessary to consider these sections in this place, as the recent decision of the Supreme Court of the United States, in *Fitzgerald v. Green*, read March 24, 1890, by Justice GRAY, has declared that electors for President and Vice-President, although appointed by and acting

under the Constitution, are no more officers or agents of the United States than are the members of the State legislatures when acting as electors of Federal Senators, or the people when acting as electors of representatives in Congress: hence the States and the State courts have power to punish fraudulent voting in the choice of their electors. The opinion is too brief to be satisfactory and does not decide as some have imagined, that the State courts have exclusive jurisdiction: this point was not necessary for the decision, as recognition of the jurisdiction of the State courts was sufficient. The case was this: Green had been convicted by the Hustings court of Manchester (Virginia), of voting for Presidential electors while disqualified under the State law; the United States Circuit Court discharged Green on *Habeas Corpus* and this discharge was reversed by the Supreme Court. The case really involved the question of double punishment, as a Representative in Congress was also voted for, and the reversal in this respect operated to affirm the propriety of the criminal suffering as much as the different laws might allow, without deciding the point: (see *infra*, page 364).

It will be observed that nothing in this utterance of the Supreme Court touches upon section 5520 of the Revised Statutes (*infra*, page 363): in fact, the exact position of Presidential electors urgently needs definition.

IV

The doctrine generally held by the courts, is, that the right to vote depends on the laws of the State where this franchise is exercised, and is not granted to a citizen, nor guaranteed by the Constitution of the United States: per BOND, C. J., *U. S. v. Crosby et al.* (1871), U. S. Circ. Ct., Dist. S. C., 1 Hughes 448, 456.

[This was justly denied by Justice MILLER, in the *Yarborough* case, in this language:—

But it is not correct to say that the right to vote for a member of Congress, does not depend on the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution, and by that alone. It also declares how it shall be filled, namely, by election. * * * The States, in prescribing the qualifications of voters for the most numerous branch of their own legislatures do not do this with

reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those [members] *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualifications thus furnished, as the qualifications of its own electors for members of Congress.

It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State : (110 U. S. 663.)

The Fifteenth Amendment has been construed to confer the right to vote upon no one, and merely to invest citizens of the United States with right of exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude. It is said the right to vote comes from the States, but the right from the prohibited discrimination comes from the Federal Government. But, unless a citizen is otherwise qualified to vote, he cannot avail himself of his franchise. Thus, where a State law provides the qualifications of its voters, and no prohibited discrimination is made, all voters must have those qualifications before they can insist upon their right to cast their ballots ; they must be qualified voters before they can have an officer indicted for refusing their ballot : *United States v. Reese* (1875), 92 U. S. 214.

Neither the Constitution, nor the Fourteenth Amendment, made all citizens voters, and a provision in a State Constitution which confines the right of voting to male citizens of the United States is no violation of the Federal Constitution, and an officer refusing the ballot of a woman, violates no law, State or National, because the woman had no right to the elective franchise ; the new Amendments do not enlarge the privilege of suffrage so as to entitle anyone to vote : *Minor v. Happersett*, (1874), 21 Wall. (88 U. S.) 162.

[The year previous, one of the concurring Justices in *Minor v. Happersett* (HUNT), sitting in the Circuit Court, for the Northern District of New York, and upon an indictment of Miss Susan B. Anthony, for voting at an election for Representatives in Congress, under section 5511 of the Revised Statutes directed a verdict of guilty, saying—

The right of voting, or the privilege of voting, is a right or privilege arising under the Constitution of the State, and not under the Con-

stitution of the United States. * * If the right belongs to any particular person, it is because such person is entitled to it by the laws of the State where he offers to exercise it, and not because of citizenship of the United States. * * If the Legislature of the State of New York should require a higher qualification in a voter for a Representative in Congress than is required of a voter for a member of the House of Assembly of the State, this would, I conceive, be a violation of a right belonging to a person as a citizen of the United States. That right is in relation to a Federal subject or interest, and is guaranteed by the Federal Constitution : 14 Blatchf. 205.

As already noticed, the Supreme Court of the United States bases the right to vote for Congressmen upon the Federal Constitution, and it has been thought, that if the rules of logic are rigidly applied to the opinion, the distinction is more seeming than real.

[This sentiment has sought support from the distinction drawn by Justice MILLER, in the *Yarborough* case, where the broad language of WAITE, C. J., in *Minor v. Happersett* (1874), 21 Wall. (88 U.S.) 162, was restrained to its immediate subject matter.

But the Court was combatting the argument that this right [to vote] was conferred on all citizens, and therefore upon women as well as men.

In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the State where the voting is to be done ; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the State for the description of the class. But the Court did not intend to say, that when the class or the person is thus ascertained, his right vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.

The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitations of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the States : *Ex parte Yarborough* (1883), 110 U. S. 651, 664.

V.

The provisions of the Statutes of the United States which are enforceable by the Federal Courts in trials of offenders against the ballot box, are both general and special, the latter

relating solely to election offenses. Of the general statutes, the following are applicable to the subject.

SECTION 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the Court. (Act of March 2, 1867, Section 30, 14 Stat. at Large 484, as amended by Act of May 17, 1879, 21 Stat. at Large 4, and now incorporated into the Revised Statutes.)

[Under this Statute, in 1887, Coy was successfully indicted in the Indianapolis ballot box case : 127 U. S. 731 ; 31 Fed. Repr. 794. It is, of course, a general Statute, not simply applicable to election cases, and has had its most extensive application in revenue cases : See the references in Gould and Tucker's notes on the Revised Stat. U. S. pp. 1023-6.

CHAP. CXIV. *An Act to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes.* (Approved May 31, 1870, 16 Stat. at Large 139.)

SEC. 6, as incorporated in the Revised Statutes : to wit—

SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen, in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same ; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years ; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit or trust, created by the Constitution or laws of the United States.

[In the next year, by Act of April 20, 1871, Section second, (17 Stat. at Large 13), and now incorporated in the Revised Statutes as Section 5407, punishment was provided for a conspiracy to defeat the due course of justice in cases such as are forbidden in Section 5508, just quoted.

[This section is constitutional : *Baldwin v. Franks* (1886), 120 U. S. 678, 690, a Chinese case affirming *U. S. v. Waddell* (1884), 112 Id. 76, a homestead entry, affirming *Ex parte Yarbrough* (1883), 110 Id. 651, a case of intimidation of a colored voter ; but it protects only persons who are "citizens," in a political sense, as voters. The interpretation put upon it by

Chief Justice WAITE is as severe as that put by the same Justice upon Sections three and four of the same Act of 1870, in *U. S. v. Reese* (1875), 92 U. S. 214; a construction so severe that the Court was obliged to give an explanation in *Supervisors v. Stanley* (1881), 105 Id. 305, where the question was one of taxation and not of civil rights. Justice MILLER, delivering the opinion in the latter case, said—

This Court, in the two cases cited in the brief, *United States v. Reese* (92 U. S. 214) and *Trade Mark Cases* (100 Id. 82), concedes the general principle that the whole of a statute is not necessarily void because a part of it may be so. * * * The first case also implies that there may be unconstitutional provisions which do not vitiate the whole statute, or even a single section, because the argument is to show that in that case there could be no separation of the good from the bad. It is also to be observed that, in both these cases, it was a statute creating and punishing offences criminally which was to be construed in regard to the limited constitutional power of Congress in criminal matters.

[The last sentence explains the seeming preference of the rich tax payer over the poor voter.

[Returning to *Baldwin v. Franks*, the substance of the decision is contained in the words of Chief Justice WAITE.—

This section is highly penal in its character, much more so than any others, for it not only provides as a punishment for the offence, a fine of not more than five thousand dollars and an imprisonment of not more than ten years, but it declares that any person convicted, shall "be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." It is, therefore, to be construed strictly; not so strictly as to defeat the legislative will, but doubtful words are not to be extended beyond their natural meaning in the connection in which they are used. Here the doubtful word is "citizen," and it is used in connection with the rights and privileges pertaining to a man as a citizen, and not as a person only, or an inhabitant. And, besides, the crime has been classified in the revision [*i. e.*, the arrangement of the Revised Statutes of the United States,] among those which relate to the elective franchise and the civil rights of citizens. For these reasons we are satisfied that the word "citizen," as used in this statute, must be given the same meaning it has in the Fourteenth Amendment of the Constitution, and that, to constitute the offence which is there provided for, the wrong must be done to one who is a citizen in that sense * * * It may be that by this construction of the statute, some are excluded from the protection it affords, who are as much entitled to it as those who are included; but this is a defect, if it exists, which can be cured by Congress, but not by the Courts: (120 U. S. 691).

[These last words seem to have allusion to the vigorous dissent in that case, by Justices HARLAN and FIELD.

Other statutes and authorities on intimidating the voter appear later: (see page 360).

VI.

[The statutes especially relating to the suffrage may be divided into two classes; those relating to Federal elections, and those protecting the exercise of the suffrage generally.

Among the former are Section Nineteen of the Act of 1870 (whose title has already been quoted) which is now incorporated in the Revised Statutes as follows:—

SEC. 5511. If, at any election for Representative or Delegate in Congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living or dead, or fictitious; or votes more than once at the same election for any candidate for the same office; or votes at a place where he may not be lawfully entitled to vote; or votes without having a lawful right to vote; or does any unlawful act to secure an opportunity to vote for himself, or any other person; or by force, threat, intimidation, bribery, reward, or offer thereof, unlawfully prevents any qualified voter of any State, or of any Territory, from freely exercising the right of suffrage, or by such means induces any voter to refuse to exercise such right, or compels or induces, by any such means, any officer of an election in any such State or Territory, to receive a vote from a person not legally qualified or entitled to vote; or interferes in any manner with any officer of such election in the discharge of his duties; or by any such means, or other unlawful means, induces any officer of any election, or officer whose duty it is to ascertain, announce or declare the result of any such election, or give or make any certificate, document or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the same; or knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote, or aids, counsels, procures, or advises any such voter, person or officer to do any act hereby made a crime, or omit to do any duty, the omission of which is hereby made a crime, or attempt to do so, he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both, and shall pay the costs of prosecution.

[The phrase "officers of any election," is examined later on page 360.

[In the Coy case, (*supra*), the offence was a conspiracy to induce the election officers to refuse to comply with their duty in safe-keeping the election returns, and an effort was made to secure a ruling to the effect that the evil intent, though directed against the State as well as the Congressional returns, which were all on one sheet, must nevertheless be shown to have

been specifically directed against the Congressional vote. This was denied, after the analogy of the killing of one person for another, and of the laws relating to gunpowder and similar dangerous substances. MILLER, J., writing the opinion of the Court, added—

The object to be attained by these Acts of Congress is to guard against the danger, and the opportunity, of tampering with the election returns, as well as against direct and intentional frauds upon the vote for the members of that body. The law is violated whenever the evidences concerning the votes cast for that purpose are exposed, or subjected in the hands of improper persons, or unauthorized individuals to the opportunity for their falsification, or to the danger of such changes or forgeries as may affect that election, whether they actually do so or not, and whether the purpose of the party guilty of thus wresting them from their proper custody and exposing them to such danger, might accomplish this result. *In re Coy* (1887), 127 U. S. 731, 754.

[Consequently the ruling of GRESHAM, J., in another case, would seem to be too strict, unless there were different tally sheets, poll books, ballot boxes and returns, for State and Congressional elections, and no effort to vote for Congressman as in *U. S. v. Scaman* (1885), U. S. Circ. Ct., S. Dist. N. Y., 23 Fed. Repr. 882. The ruling of GRESHAM was as follows—

The mere fact that a representative in Congress is voted for at an election of State and County officers, does not authorize Congress to regulate such elections in matters which in no wise relate to or affect the result so far as it concerns the United States. It has no more right to regulate the election of State and County officers, under these circumstances, that it would have if no representative in Congress were voted for; and it has not attempted to do so.

The jurisdiction of the Federal Courts, in the enforcement of these statutes, depends altogether upon something having been done, or omitted, which has affected, or might affect, the result of an election for a representative in Congress. The facts stated in the affidavit, in connection with the admissions of counsel in the course of argument, show that the result of the election was not affected, unless it was by the mutilation of the tally papers solely and exclusively in the statements of the vote for coroner and criminal judge. It is not pretended that the tally papers were mutilated, changed, or forged in any other respect, or that any of the tally papers, poll books, or ballots, were removed from their proper place of custody. The alleged offense against the United States consists wholly in the alteration of the statements of the votes for coroner and criminal judge, as contained in the tally papers: *Ex parte Perkins* (1887), U. S. Circ. Ct., Dist. Indiana, 29 Fed. Repr. 900.

[Perkins had been committed for refusing to be sworn be-

fore an United States Commissioner, in a proceeding against others based on the affidavit mentioned by Judge GRESHAM. Perkins was therefore discharged, but afterwards was indicted and convicted with others, for obtaining possession of the tally paper, poll list and certificate, contrary to Section 5511, *supra*. One of the co-defendants, Coy, petitioned for a *habeas corpus*, but was denied by Justice HARLAN, sitting in the Circuit Court with GRESHAM, July 16, 1887 (31 Fed. Repr. 794), and afterwards was again denied by the Supreme Court of the United States, May 14, 1888 (127 U. S. 731). These separate decisions were obtained by complaining of different indictments. The ruling of District Judge WOODS, which was reversed in this Perkins case by Circuit Judge GRESHAM, was thus found to be correct: it was founded on a prior case where the District Judge BLODGETT had similarly charged the jury: See 31 Fed. Repr. 912, for the extracts from this charge. This ruling of GRESHAM agreed with that of TRENT, Dist. J., in *U. S. v. Cahill* (1881), U. S. Circ. Ct., E. Dist. Mo., 9 Fed. Repr. 80.

[In December, 1886 (*U. S. v. McBosley*, U. S. Dist. Ct., Dist. Indiana, 29 Fed. Repr. 897), Judge WOODS was moved to quash a number of indictments founded upon Section 5511, *supra*, because the indictments failed to aver any unlawful ballot or any bribery in relating to a congressional election. In denying the motion the judge said—

When congressional and local elections are held at the same times, and places, and mixed ballots are cast, as is the practice in Indiana, it is a misleading refinement, I think, to say that there are two elections—a National and a State—held at the same time. It is one election, for the conduct of which the two sovereignties have a common concern, though interested in several results (*Ex parte Siebold*, [1879] 100 U. S. 371); and Congress having unquestionably the paramount, and, when it sees fit to assert it, the exclusive power to regulate such elections, must, in the first instance at least, determine for itself what regulations are necessary or expedient; and it is not the province of the courts to restrict or annul any enactment on the subject, unless it be demonstrable that, in no event, and under no circumstances, the offense defined, and coming within the letter and spirit of the enactment, could affect the election for representative in Congress.

[What would be an unlawful prevention under this section came up for decision in *U. S. v. Souders* (1871), U. S. Dist. Ct.,

Dist. N. J., 2 Abb. 456, where a company of white men, including the defendant, attacked a number of colored voters, waiting at the place of election, to deposit their ballots for a representative in Congress. This outrage occurred in Camden, N. J., on the eighth of November, 1870. The defense set up (unsuccessfully) the fact that the voters afterwards did deposit their ballots and hence there had been a violation of section 5506 of the Revised Statutes relating to intimidation, (section 14 of the Act of 1870) and not this section. The Court (NIXON, J.) followed the principles explained *infra*, page 372, and after giving a brief history of the Act of 1870, concluded that the manifest object of section 5506 was to enforce the provisions of the Fifteenth Amendment, and of section 5511 to conserve the freedom and purity of elections for representatives in Congress. As to the fact that the voters did actually cast their ballots at a later hour, and the contention that they therefore were not actually intimidated, the Court said—

It seems to me, as I have already intimated, that such a construction of the statute is too narrow, and that it defeats the purpose which Congress had in view in enacting it. This purpose was to protect men in the discharge of their most sacred political privilege. That would be a slight protection, indeed, which allows bullies and rowdies to surround the ballot box from the opening to the close of the polls, keeping off all legal voters by threats, intimidation, or force ; and then to hold the offense is not committed, if by chance the hindered voters should avail themselves of a casual opportunity, to slip in their ballots when the backs of these vigilant sentinels are turned : (page 467.)

[The prohibition against bribery has the same general object as that against intimidation : both are designed to prevent any interference with the free exercise of the right of suffrage. Hence, it is immaterial that the bribe was not in relation to the ballot for Representative, and no such averment is necessary in the indictment : because the theory of the law, in agreement with experience, holds a voter, bribed for one purpose, to be unfitted for the right use of the ballot for every purpose : *U. S. v. McBosley* (1886), U. S. Dist. Ct., Dist. Indiana, 29 Fed. Repr. 897, 899.

[Unlawful voting is not merely forbidden and punished by section 5511, but an important matter of detail was added in

the same Act of 1870 by Section Twenty-one, now incorporated with the Revised Statutes as—

SECTION 5514. Whenever the laws of any State or Territory require that the name of a candidate or person, to be voted for as Representative or Delegate in Congress, shall be printed, written, or contained, on any ticket or ballot, with the names of other candidates or persons to be voted for at the same election, as State, territorial, municipal, or local officers, it shall be deemed sufficient *prima facie* evidence to convict any person charged with voting or offering to vote, unlawfully, under the provisions of this chapter, to prove that the person so charged, cast or offered to cast such a ticket or ballot whereon the name of such Representative or Delegate might by law be printed, written or contained, or that the person SO charged committed any of the offenses denounced in this chapter with reference to such ticket or ballot.

[The word SO is here printed in capitals to catch the eye, as the word has no place in the section, according to the ruling of Justice BREWER, while Circuit Judge, in *U. S. v. Morrissey* (1887), U. S. Circ. Ct., E. Dist. Mo., 32 Fed. Repr. 147. Morrissey was judge of an election where representatives in Congress were voted for as well as State and county officers and was convicted of receiving ballots from persons known to him not to be entitled to vote. He moved in arrest of judgment, that this Section was intended to apply only to the party voting or offering to vote. This was denied, the Court saying—

It is a familiar rule that, that which is within the letter of a statute, and not within its spirit, is not within the statute; and also that, that which is within the spirit, though not within the letter, may sometimes be declared to be within the statute, even in Criminal cases. Reading that [section] as it is expressed, "so charged," it makes that clause superfluous, meaningless, and worse than that, because a person "so charged," could not be convicted of any offense but that of which he is charged, and could not be convicted of any of the offenses named in this chapter. Obviously, that was not the intent of Congress.

Through carelessness in the drafting or compilation of this section, that word "so" was interpolated improperly, and the only fair construction of that section is to treat it as though that word was not there. So read, it gives force and validity to this clause which otherwise it would not have. So read, it gives meaning to the whole section, and carries out the obvious intent of Congress, that, where there is a single ballot at any election at which, under the law of the State, all names must appear on the same ballot, the production of the ballot is *prima facie* evidence, sufficient to convict, etc., in the trial of any of the offenses named in this chapter. I think that objection, therefore, is not well taken.

[The carelessness spoken of will appear by a comparison

In place of words printed in italics in section 5514, the Act of 1870 used other words, also printed below in italics and added a clause, after the italics, which the Revised Statutes omit, the original reading,—

SECTION 21. *And be it further enacted*, that whenever, by the laws of any State or Territory, the name of any candidate or person to be voted for, as representative or delegate in Congress, shall be required to be printed, written, or contained in any ticket or ballot with other candidates or persons to be voted for at the same election for State, territorial, municipal or local officers, it shall be sufficient *prima facie* evidence, *either for the purpose of indicting or convicting any person charged with voting, or attempting or offering to vote unlawfully, under the provisions of the preceding sections, or for committing either of the offenses thereby created to prove that the person so charged or indicted, voted or attempted or offered to vote such ballot or ticket, or committed either of the offenses named in the preceding sections of this Act, with reference to such ballot.* And the proof and establishment of such facts shall be taken, held and deemed to be presumptive evidence that such person voted, or attempted or offered to vote, for such representative or delegate, as the case may be, or that such offense, was committed with reference to the election of such representative or delegate, and shall be sufficient to warrant his conviction, unless it shall be shown, that such ballot, when cast, or attempted or offered to be cast by him, did not contain the name of any candidate for the office of representative or delegate in the Congress of the United States, or that such offense was not committed with reference to the election of such representative or delegate : (16 Stat. at Large 145.)

[The omission of the last words, printed in "roman," now appears to have been discreet, since the Federal Courts afterwards decided to punish for all offenses against the ballot box, at an election where a Representative or Delegate in Congress is voted for : (*supra*, page 350). But, in other respects, the section, both originally and as incorporated, is merely a rule of evidence. Hence, Morrissey finally escaped on account of the absence from his indictments, of the words necessary to charge him with an act affecting the election of Congressmen. The Court expressly followed the cases of *U. S. v. Cahill* (1881), U. S. Circ. Ct., E. Dist. Mo., 9 Fed. Repr. 80, and *U. S. v. Seaman* (1885), U. S. Circ. Ct., S. Dist. N. Y., 23 Id. 882. All these cases preceded the Coy cases and the ground is now clear for a final decision that an indictment would be sufficient if it averred certain forbidden acts at an election where Representatives in Congress were to be balloted for : (*supra*, pages 350, 351).

[While indeed this section 5514 does relate to evidence, the effect of such a regulation of the proof is to dispense with the averment in the indictment, that the ballot cast contained the name of a candidate for Representative in Congress: *U. S. v. McBosley* (1886), U. S. Dist. Ct., Dist. Indiana, 29 Fed. Repr. 897.]

Section Twenty of this Act of 1870 was amended the following year (Act of February 28, 1871, 16 Stat. at Large 433), by inserting the italicized words, so as to read (in the Revised Statutes)—

SEC. 5512. That if, at any registration of voters for an election for representative or delegate in the Congress of the United States, any person knowingly personates and registers, or attempts to register, in the name of any other person, whether living, dead, or fictitious, or fraudulently registers, or fraudulently attempts to register, not having a lawful right so to do; or does any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevents or hinders any person having a lawful right to register, from duly exercising such right; or compels or induces, by any of such means, or other unlawful means, any officer of registration to admit to registration any person not legally entitled thereto, or interferes in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induces any officer of registration to violate or refuse to comply with his duty, or any law regulating the same; *or if any such officer knowingly and wilfully registers as a voter any person not entitled to be registered, or refuses so to register any person entitled to be registered; or if any such officer or other person who has any duty to perform in relation to such registration or election, in ascertaining, announcing, or declaring the result thereof, or in giving or making any certificate, document, or evidence in relation thereto, knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law, or does any act unauthorized by law, relating to or affecting such registration, or election, or the result thereof, or any certificate, document, or evidence in relation thereto, or if any person aids, counsels, procures, or advises any such voter, person, or officer, to do any act hereby made a crime or to omit any act, the omission of which is hereby made a crime, every such person shall be punishable as prescribed in the preceding Section.* [i. e. Section 5511.]

[The words in *italics* took the place of the words "or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote," in the original act.]

[This section depends upon the power of Congress to de-

clare that a fraudulent registration, or a fraudulent attempt to register, for the purpose of voting for a Representative or Delegate in Congress, is a crime against the United States. It does not involve the power to ordain a National registration law, for it does not operate until the State has imposed registration.

[Entertaining no doubt of this power, the Court overruled the demurrer to the indictment and the defendant was sentenced to two years imprisonment : *U. S. v. Quinn* (1870), U. S. Circ. Ct., S. Dist. N. Y., 8 Blatchf. 48, *Coram*, WOODRUFF and BLATCHFORD, JJ.

[This ruling of the Court was made with the statute of 1870 before it, and the section construed had a proviso appended which is now incorporated in the Revised Statutes, as—

SEC. 5513. Every registration made under the laws of any State or Territory, for any State or other election at which such Representative or Delegate in Congress may be chosen, shall be deemed to be a registration within the meaning of the preceding Section, notwithstanding such registration is also made for the purpose of any State, Territorial, or municipal election.

Under section 5512, the neglect or refusal of an election officer to perform a duty required by law, in regard to an election, at which a Representative of Congress is voted for, is made an offence against the United States, although such non-performance of duty is without any evil intent; while the doing of an act simply unauthorized by law is not punishable, unless done with an intent to affect the election or the result thereof. Whether such a distinction is justified by sound public policy was for the law-making department of the government to determine, and not for the courts: *In re Coy* (1887), U. S. Circ. Ct., Dist. Indiana, 31 Fed. Repr. 794, 797, per HARLAN, J., who also said—

Observe, "intent" is not made an element in determining the existence of the offences specified in that section, except in those cases where the offender knowingly does an act "unauthorized" by the law of the United States, or by the law of the State or Territory under whose sanction he exercises the functions of an officer of election.

[And the learned Justice proceeded to quote with approval from the decision of the United States District Judge (HAMMOND) overruling a demurrer to an indictment under this Sec-

tion, in *U. S. v. Jackson* (1885), U. S. Circ. Ct., W. Dist. Tenn., 25 Fed. Repr. 548, interposed on the ground that no specific intent to violate the law had been charged.

[In this Tennessee case, in addition to that of want of charge of specific intent, the demurrer also set up the want of any penalty in the State laws. This was also held to be no ground for demurrer, the learned Judge saying—

It is the plain purpose of this statute to declare as an offense against the United States, *proprio vigore*, the neglect, refusal, or violation of any duty imposed upon an officer holding an election for representative in Congress, by any law, State or Federal. It is not necessary, as counsel argue, that the State law imposing the duty shall attach a penalty for its violation, in order to make it an offense under this statute. The only object for which we look to the State law, is to find the measure of the officer's duty, as one charged with the function of holding the election. Once given a duty to perform in that regard, and its performance is an obligation imposed by this Federal statute. Its non-performance subjects the officer to the penalties here imposed. It is wholly immaterial how the Statute laws may look upon, or treat, a violation of his duty; for when the duty is assumed by him, he comes immediately within the jurisdiction of the Federal law, and must obey it, or take the consequences here by this statute itself imposed for any neglect, refusal, or violation of that duty: 25 Fed. Repr. 549.

[Section Twenty-two of the Act of 1870 was incorporated into the Revised Statutes, the last word being changed from "ten" to "eleven" by the Act of February 18, 1875 (18 Stat. at Large 316, 320): to wit—

SEC. 5515. Every officer of an election at which any Representative, or Delegate, in Congress is voted for, whether such officer of election be appointed, or created, by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election, required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such Representative or Delegate; or who withholds, conceals, or destroys any certificate of record so required by law respecting the election of any such Representative or Delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures, or advises any voter, person or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty, the omission of which is by this, or any of such sections, made a crime, or attempts so to do, shall be punished as prescribed in section fifty-five hundred and eleven. [*Supra.*]

[This section is constitutional: *U. S. v. Gale* (1883), 109 U. S. 65, 66, following the *Siebold* and *Clarke* cases (1879), 100 Id. 371, 399.

[As the question of intention is not an element under section 5512, except when the officer of election knowingly does an unauthorized act; so under section 5515, there are two offenses; the one arising from neglect or refusal, and the other from intention to affect the result of the election: *U. S. v. Baldridge* (1882), U. S. Circ. Ct., N. Dist. Ala., 11 Fed. Repr. 552. In this case the election officers were charged with making a false certificate of the result of the election, the evidence showing the certificate was false because the ballot box had been tampered with by other persons after the close of the election and before the ballots in the box had been counted.

Leaving the ballot box so that it could be tampered with, was held to be sufficient evidence that the certificate was fraudulently false, BRUCE, District Judge, charging the jury that—

When the officer of election has the means and ability to prevent mischief and fraud, he must do so; and if, through his carelessness and indifference, the fraud is perpetrated, his negligent conduct, under such circumstances, becomes culpable and is what the law calls criminal negligence: Id. 556.

[The same ruling was made in *U. S. v. Jackson* (1885), U. S. Circ. Ct., W. Dist. Tenn., 25 Fed. Repr. 548; both cases proceeding upon the common ground that the specific intent applies only to the clause in which it is found, and not to the preceding or following clauses.

[It is true that the jury in *U. S. v. Foster* (1881), U. S. Circ. Ct., E. Dist. Va., 6 Fed. 247, were instructed that the rejection of ballots offered by those entitled to vote, was only a technical violation of section 5515, and that they should be satisfied of some wrongful purpose, motive or intention, in such rejection. This case is, therefore, opposed to the distinction drawn above; it does not carry much weight with it, as it regards the officer rather than the act.

[Hence a clerk of the election, whose duty it is to attest the signatures of the judges, and who is not required to know whether the certificate is correct, cannot be indicted for merely

attesting : *U. S. v. Green* (1887), U. S. Circ. Ct., E. Dist. Mo., 33 Fed. Repr. 619; and a joint indictment with the judges of the election is bad : *U. S. v. Davis*, Id. 621.

[An illustration of an intentional crime under this section appears in *U. S. v. Bader* (1882), U. S. Circ. Ct., E. Dist. La., 4 Woods 189, where the election officers demurred to an indictment charging them with adding names to the registry, without authority of law and with intent to affect an election at which a Representative in Congress would be voted for. The demurrer was overruled. Of course the allegation must be proved : *U. S. v. Wright* (1883), U. S. Circ. Ct., E. Dist. La., 16 Fed. Repr. 112.

[Again, in *Matter of Spooner* (1880), U. S. Circ. Ct., S. Dist. N. Y., 9 Abbott's New Ca. 481, the Court, composed of BLATCHFORD and CHOATE, were unanimous in the opinion that a deputy marshal or chief supervisor would be liable for purposely omitting until election day the service of a warrant for illegal registration, the former Judge saying—

We both agree that where a man can be arrested before election day as well as not, he ought to be so arrested. If there is any delay in arresting him where he could have been arrested before that day, it must be presumed to be for the purpose of preventing him from voting, and consequently unlawful : Id. 483.

In *U. S. v. Caruthers* (1882), U. S. Circ. Ct., N. Dist. Miss., 15 Fed. Repr. 309, there was a motion to quash an indictment charging the appointment of an inspector who could not read and write, with the intention of affecting an election where a Representative in Congress was voted for. The motion was refused, HILL, J., saying—

The [State election] statute provides, and properly so, that, in any event, competent and suitable persons shall be appointed to discharge these important trusts, if such persons can be procured, and the presumption is that every County and election district does contain a sufficient number of such competent and suitable persons to perform these duties, and that, if appointed, they will serve. If any county or district should be so unfortunate as not to contain such persons they ought to be abolished and added to such as do contain them. It is an impossibility for a person, who can neither read nor write, to properly discharge the duties of an inspector of such elections; it is their duty to determine what votes are proper to be received and counted, and those properly to be rejected; to ascertain the whole number cast for each candidate and to make and sign the proper returns.

[It was under this section 5515, that the Governor of Arkansas was indicted for issuing a fraudulent certificate of election. Without entering into the merits at all, the United States District Court (composed of DILLON and Caldwell, JJ.) sustained a demurrer, on the ground that the Governor of a State was not an officer of election: *U. S. v. Clayton* (1871), 2 Dillon 219; S. C. 10 AMERICAN LAW REGISTER 737. This citation in the margin of the Revised Statutes is incorrectly given "19 Amer. L. Rep. 737," being both a misprint and a disregard of the numbering of the New Series. The decision itself proceeded upon two grounds; the popular use of the words "officers of election", and the danger of disturbing the political harmony of the Union upon a mere construction of a statute. The authorities followed are collated (*infra*, page 372).

[The definition of an "officer of an election" was also entered upon in *U. S. v. Fisher* (1881), U. S. Circ. Ct., S. Dist. Ohio, 8 Fed. Repr. 414, where a supervisor, appointed under the laws of the United States, was indicted for stuffing the ballot box, and demurred on the ground that he was not an "officer of election." The demurrer was overruled, after an examination into the duty of a supervisor.

VII.

[In addition to the general crime of intimidating a citizen (*ante*, page 347) there are two classes of statutes relating especially to the ballot. One of these relates to violation of rights secured in every State and Territory to every voter, by the Fifteenth Amendment. Want of space forbids examination into this class of intimidations, and requires that attention should be given solely to the other class of statutes relating to voters for electors for President or Vice-President, or for Representatives in Congress.

[In 1883 Munford and others demurred to an information in the United States Circuit Court for the Eastern District of Virginia, charging them with conspiracy to prevent, as well as actually delaying the assessment of certain voters as required to be done to qualify them to vote. The authority for such information was in the Revised Statutes—

SEC. 5506. Every person who, by any unlawful means, hinders, delays,

prevents or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at any election in any State, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be fined not less than five hundred dollars, or be imprisoned not less than one month nor more than one year, or be punished by both such fine and imprisonment.

[The margin of the Revised Statutes indicates that this Section was derived from Section four of the Act of 1870; it also refers to the cases of *U. S. v. Reese* (1875), 92 U. S. 214, and *U. S. v. Cruikshank* (1875), Id. 542, where Section four was pronounced unconstitutional. Of course, the counsel for Munford raised the constitutional question; the Court, composed of Judges BOND and HUGHES, denied the application of these decisions, pointing out that they were rendered in civil rights cases and not at or connected with congressional elections, and under Section four of the Act of 1870, which was connected with the preceding sections by the words "as aforesaid." This latter point was especially dwelt upon by both the judges:—

The information in this case is founded upon Section 5506 of the Revised Statutes of the United States. I will remark that that Section is not the same law as Section four of the Enforcement Act of May 31, 1870. It is nearly the same in terms, but it contains no words connecting it with other sections of any act, as Section four did. It stands upon its own terms and language. It was not enacted in the same bill as Section four of the Act of 1870, or at the same time, or by the same Congress. It was enacted in 1874, and took effect as a law on the first of December, 1874, two months after the case of *U. S. v. Reese* was argued before the Supreme Court of the United States, and more than two years after the indictment was found, which was passed upon in that case. The Supreme Court did not in the case of *Reese*, and has not in any subsequent case, passed upon Section 5506 of the Revised Statutes; and, whatever it may have ruled in any of its decisions upon any other statute, such as Section four of the Enforcement Act of 1870, *non constat* that it has thereby ruled upon Section 5506, upon which the information before us is founded.

We are dealing here with an offense charged to have been committed at a Federal election, in violation of this Section 5506; and the defense ask us to base our ruling, in this case of a Federal election, upon the ruling of the Supreme Court in a case arising in a town election, under the Act of 1870, in which that Court not only carefully confined itself to the case before it, but protested by iteration, that it was not considering any law in its relation to Federal elections: HUGHES, J., *U. S. v. Munford* (1883), U. S. Circ. Ct., E. Dist. Va., 16 Fed. Repr. 223, 229.

[Munford had still further trouble, as he was sued for refusing to assess one Brown, who wished to qualify himself to vote for Congressmen. The declaration contained the necessary averments, to bring the case within the Revised Statutes—

SEC. 2005. When, under the authority of the constitution or laws of any State, or the laws of any Territory, any act is required to be done as a prerequisite or qualification for voting, and by such constitution or laws, persons or officers are charged with the duty of furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, every such person and officer shall give to all citizens of the United States, the same and equal opportunity to perform such prerequisite, and to become qualified to vote.

SEC. 2006. Every person or officer, charged with the duty specified in the preceding Section, who refuses or knowingly omits to give full effect to that section, shall forfeit the sum of five hundred dollars to the party aggrieved by such refusal or omission, to be recovered by an action on the case, with costs, and such allowance for counsel fees as the court may deem just.

[A demurrer to this declaration was overruled upon the principles already decided in the criminal case (*U. S. v. Munford*), Judge HUGHES adding—

We hold that Section 2005 was passed by Congress subsequently to the Act of May, 1870, as part of the laws of the Revised Statutes relating to the *elective franchise*; that it was passed in virtue of the general powers of Congress over Federal elections; that it is not, necessarily, to be construed in connection with the preamble and context of the Act of May, 1870; that it was enacted independently of such context, as it now stands in the Revised Statutes, on the twentieth of June, 1874; that Congress must be held to have applied it to Federal elections whether express language was used to that effect or not; that it does not in its present form and *status* apply to State elections, because, in respect to them, the section, in order to be valid under the Fifteenth Amendment, which gives only limited powers of legislation over State elections, must contain apt words bringing it within the province of the amendment, which words are wanting; that the fact that the section is not warranted by the Fifteenth Amendment does not render it null if it is authorized by Article one of the Constitution; and that if the discrimination complained of in this suit resulted, as alleged, in depriving the plaintiff of the privilege of voting equally with all others entitled to vote in a Federal election, the declaration is good.

VIII.

[The scope of this article forbids an examination into the laws regulating the holding of an election and it will merely be necessary to refer to the Sections of the Revised Statutes

(Title XXVI), relating to the appointment of supervisors, and special deputy marshals, and for holding sessions of the United States Circuit Courts. The subject will be separately considered hereafter.

CHAP. XXII. *An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States; and for other Purposes.* (Approved April 20, 1871, 17 Stat. at Large 13.)

SEC. 2, in part, as incorporated in the Revised Statutes: to wit—

SEC. 5520. If two or more persons, in any State or Territory, conspire to prevent, by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support, or advocacy, in a legal manner, toward or in favor of any lawfully qualified person as an elector for President or Vice-President, or as a member of the Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; each of such persons shall be punished by a fine of not less than five hundred, nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.

[The constitutionality of this Section was affirmed in *U. S. v. Goldman* (1878), (U. S. Circ. Ct., Dist. La.) 3 Woods 187, the Circuit Judge Woods, distinguishing the ruling in *Minor v. Happersett* (1874), 21 Wall. (88 U. S.) 178, that the Constitution of the United States conferred the right of suffrage upon no one, in a manner different from that adopted in the *Yarbrough* case by the Supreme Court: (*ante*, page 347).

But this language refers solely to voters at an election for State officers, and so far as such elections are concerned, the United States has no voters of its own.

Now, the question is, has an elector who is qualified by State law to vote for the most numerous branch of the State Legislature, a right conferred upon him by this clause of the Constitution to vote for members of Congress? * * * * It seems to be clear that the language of the Section under consideration could not have been intended merely to give a basis of representation; that was provided for by other clauses of the Constitution. If this be so, it must follow that it was intended as a declaration as to who of the people of the States, should have the right to vote for representatives in Congress. As, therefore, the elector qualified by State laws, derives his right to vote for members of Congress from the Constitution of the United States, Congress has the power to protect him in that right.

An election is not simply the depositing of a ballot in a box. If the elector is forced to vote a certain ballot against his will, it is not an election so far as he is concerned, and equally so if he is prevented by violence from voting at all. An election is the expression of the free and untrammelled choice of the electors. There must be a choice, and the ex-

pression of it, to constitute an election. Under our American Constitution, an election implies a free interchange and comparison of views on the part of the people who are voters, and finally an independent expression of choice. Any interference with the right of the elector, to make up his mind how he shall vote, is as much an interference with his right to vote as if he were prevented from depositing his ballot in the ballot box after he had made up his mind : WOODS, J., *Id.* 196, 197.

[These sentiments are much the same as those of Judge NIXON in the Camden intimidation case (*ante* page 352), and are solidly based upon the principles of interpreting election laws mentioned at the close of this article.

[The subject of electors for President and Vice-President has already been treated : (*ante*, page 343).

IX.

The United States government has not provided separate elections for Congressmen, nor has it interfered with the general laws for the conduct of those elections passed by the State, but has enacted suitable laws for the punishment of persons who violate laws at an election where votes are cast for members of Congress. In doing this, the laws of the State have been adopted, and provisions have been made for the punishment of crimes against the ballot box, in the Federal Courts. The power of Congress, under the Constitution of the United States, to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of Congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and whatever is necessary to an honest and fair certification of such election, cannot now be questioned : *In re Coy* (1888), 127 U. S. 731. The State laws which Congress sees no occasion to alter, but which it allows to stand, are, in effect, adopted by Congress. The duties devolved on the officers of elections, are duties which they owe to the United States as well as to the State : *Ex parte Siebold* (1879), 100 U. S. 371, 388.

An objection sometimes made to this doctrine, that the Federal Courts can enforce the State laws as laws of the United States, is, that if Congress can impose penalties for violation of State laws, the officer will be made liable to double punishment for delinquency, both at the suit at the State, and at the suit of the United States.

To this argument it may be said, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance, and either may call him to account: BRADLEY, J., *Ex parte Siebold* (1879), 100 U. S. 371, 389. [In this latter case, the learned Justice reviews the cases already decided; that is, the counterfeiter's case of *Fox v. The State of Ohio* (1847), 5 How. (46 U. S.) 410, where State laws against circulating counterfeit coin were held not to be repugnant to the Federal laws against counterfeiting, Justice McLEAN dissenting, among reasons, on account of the possible double punishment; it seems (page 440 of the report), that Justice STORY (who had died September 10, 1845) held the same opinion. At the time of the decision, the Court was composed of TANEY, C. J., and McLEAN, WAYNE, CATRON, DANIEL, NELSON, GRIER and WOODBURY, JJ. Three years later, the same judges went a step further, Justice DANIEL saying for the Court—

With the view of avoiding conflict between the State and Federal jurisdictions, this Court, in the case of *Fox v. The State of Ohio*, have taken care to point out, that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We think this distinction sound, as we hold to be the entire doctrines laid down in the case above mentioned, and regard them as being in no wise in conflict with the conclusions adopted in the present case: *U. S. v. Marigold* (1850), 9 How. (50 U. S.) 560, 569.

[And the Court proceeded to instruct the Circuit Court of the Northern District of New York, that the United States could punish for bringing counterfeit coins into the country and fraudulently circulating them. The Fugitive Slave law, however, brought the doctrine again into Court, where it was affirmed by nearly the same judges, WOODBURY having succeeded to CURTIS: *Moore v. Illinois* (1852), 14 How. (55 U. S.) 13, McLEAN dissenting on the sole ground of double punishment.

[In *Coleman v. Tennessee* (1878), 97 U. S. 509, the principle objected to was invoked in behalf of the State, to try, convict, and punish a murderer, who had already been tried and con-

victed for the same murder, by a court martial. The crime had been committed March 7, 1865, by a soldier, who thereby became punishable under the act of Congress of March 3, 1863, 12 Stat. at Large 736. For some reason, the sentence of the court martial had not been executed, and the criminal was convicted in the State Court in 1874. The Supreme Court of the United States held that the criminal was still within the power of the court martial and directed his delivery to the military authorities to be dealt with as required by law. This was upon the express ground that the doctrine did not apply, because the criminal was a soldier serving in a State, whose regular government was, at the time, superseded (p. 519). Justice CLIFFORD dissented, among others, for the express reason that the punishment in one sovereignty is no bar to punishment in the other (pp. 537-9); and he repeated his dissent in *Tennessee v. Davis* (1879), 100 U. S. 257, 277, where the Court denied to the State Court the right to try an officer of the United States for an homicide committed in the discharge of his duty. This has very recently been affirmed in *Neagle's case*, and was designed and operates only to shield Federal officers in the performance of their duty: See annotation to *Matter of David Neagle*, 28 AMERICAN LAW REGISTER 624. If Congress commands a State official, over whom they can have no control, the command is void: *Comm. of Ky. v. Dennison* (1860), 24 How. (65 U. S.) 66, but simply on the ground of want of power, not of clashing authority.

The people of the United States, resident within any State, are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes, and have separate jurisdictions. Together, they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. * * * This does not, however, necessarily imply that two governments possess powers in common, or bring them into conflict with each other. It is, the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can de-

mand protection from each within its own jurisdiction: WAITE, C. J., *U. S. v. Cruikshank* (1875), 92 U. S. 543, 550.

[This last case was an indictment for conspiracy, under the Enforcement Act of 1870 (16 Stat. at Large 140). The indictment was held insufficient because not stating sufficient particulars to establish that the unlawful combination was to prevent the enjoyment of a right secured by the Constitution, all rights not being secured thereby.

The doctrine that the State and the National Government are co-ordinate and altogether equal, is only partially true. Whilst the States are sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Federal Constitution and the constitutional laws thereunder, are the supreme law of the land, and when they conflict with the laws of the States, they are of paramount authority and obligation.

This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand: BRADLEY, J., *Ex parte Siebold* (1879), 100 U. S. 371, 399.

[At the same time, the care exercised in all such cases in Federal Courts is not merely technical, and does not alone spring from the principles of interpretation of Federal criminal statutes; but rather because—

It goes without saying, in our dual system of government, that the Federal government cannot take charge of a mere State election, or an election merely for State officers, and no matter what wrongs may be perpetrated in such election, they are beyond the cognizance of the Federal courts. The States, and the States alone, can punish offenses which are merely offenses against the State laws: BREWER, J., in *U. S. v. Morrissey*, (1887) U. S. Circ. Ct., E. Dist. Mo., 32 Fed. Repr. 147, 150.

X.

[The doctrine that Congress could enforce State election laws with the same effect as statutes of the United States, was declared to be constitutional in the cases of *Siebold* and *Clarke*, decided by the Supreme Court of the United States in October Term, 1879, and reported in 100 U. S. 371, 399. In each case, the opinion was delivered by Justice BRADLEY, with the concurrence of Chief Justice WAITE, and Justices MIL-

LER, STRONG, HUNT, SWAYNE and HARLAN. Justices FIELD and CLIFFORD dissented.

[An interesting application of this principle appears in the summary of the evidence given in the charge of the District Judge JACKSON, in *U. S. v. Carpenter*, U. S. Cir. Ct., Dist. Tenn., December 3, 1889, 41 Fed. Repr. 330: the returns showed 43 Republican ballots, while the evidence established that 109 Republican voters had deposited their ballots. Still more interesting is *U. S. v. Badinelli*, U. S. Circ. Ct., W. Dist. Tenn., December 20, 1888, 37 Fed. Repr. 138, where the election officers were indicted for excluding an elector from witnessing the count as allowed by the State Statutes, but escaped by proving that the manner of making the count was not legal under the State Statute, and hence no violation of the Federal law.

[The doctrine was amplified in 1888, (*In re Coy*, 127 U. S. 731, 753) so as to include the enforcement of State election laws by the United States Courts, not only for violation of those laws in respect to the ballots cast for Representatives in Congress, but also to those for State officers, so to prevent any tampering with any ballots at any election where Representatives in Congress are voted for. The decision was by Justice MILLER, with the concurrence of Justices BRADLEY, HARLAN, MATTHEWS, GRAY, BLATCHFORD and LAMAR; Justice FIELD dissented, and Chief Justice WAITE had died before the entry of the final judgment.

[The application of this principle resulted in a conviction for entering upon the book of registration of voters (under the Missouri Statute of 1883, Laws, p. 38), the names of persons who did not apply for registration or take any oath, such as the law requires: *U. S. v. Molloy*, April 20, 1887, U. S. Circ. Ct., E. Dist. Mo., 31 Fed. Repr. 19; *U. S. v. O'Connor*, June 3, 1887, Id. 449.

[In the *Clarke* case, Justices FIELD and CLIFFORD dissented on the ground—

First, that it is not competent for Congress to punish a State officer for the manner in which he discharges duties imposed upon him by the laws of the State, or to subject him in the performance of such duties, to the supervision and control of others, and punish him for resisting their interference; and,—

Second, that it is not competent for Congress to make the exercise of its punitive power dependent upon the legislation of the States.

Clarke had been convicted in the United States Circuit Court for the Southern District of Ohio, under Section 5515 of the Revised Statutes of the United States (*ante*, page 357) for a violation as an officer of the election, of the law of the State of Ohio, regulating an election at which a Representative in Congress was voted for, in not conveying the ballot box, to the county clerk, after it had been sealed up and delivered to him for that purpose, and for allowing it to be broken open.

[Siebold and others were judges of an election at which Representatives in Congress were voted for in the City of Baltimore, on the fifth of November, 1878, and they were convicted in the United States Circuit Court for the District of Maryland, under the same Section 5515 and also Section 5522 of the Revised Statutes of the United States, for stuffing the ballot boxes and preventing the United States Supervisors from performing their duties. The general propositions of the counsel for the prisoners were all denied, though not going so far as the two propositions of the dissenting justices; they were—

1. That the power to make regulations as to the times, places and manner of holding elections for Representatives in Congress, granted to Congress by the Constitution, is an exclusive power when exercised by Congress.

2. That this power, when so exercised, being exclusive of all interference therein by the States, must be so exercised as not to interfere with, or come in collision with, regulations presented in that behalf by the States, unless it provides for the complete control over the whole subject over which it is exercised.

3. That, when put in operation by Congress, it must take the place of all State regulations of the subject regulated, which subject must be entirely and completely controlled and provided for by Congress.

To this the Court, speaking by Justice BRADLEY, said—

We are unable to see why it necessarily follows that, if Congress makes any regulations on the subject, it must assume exclusive control of the whole subject. The Constitution does not say so: (100 U. S. 383.)

Coy was convicted in the United States Circuit Court for the District of Indiana, of conspiring to interfere with the officers of an election at which Representatives in Congress

were voted for ; that the conspirators did by unlawful means, induce the officers to violate and refuse to comply with their duty in regard to the custody and safe keeping of the election returns ; and that they persuaded and induced these officers, or attempted so to do, to omit their duty in regard thereto. The indictment was attacked by the defense because it contained no averment that the intent and purpose of the prisoner's conduct was to affect in any manner the election of a member of Congress, or to influence the returns relating to that office. It was argued that since there were many State and local officers also voted for at the same election, and in those precincts, and as it was consistent with the indictment that the actions of the conspirators were directed only to the election of those persons, and not to that for federal office,—of a Congressional Representative—the indictment was for that reason insufficient.

It was held, that an indictment in the courts of the United States, for conspiracy to induce these inspectors to omit their legal duty, so that the papers specified might come to the hands of persons who changed and falsified the returns, it was not necessary to aver or to prove the intention of the wrongdoers or conspirators to affect or change the returns as to the election of the Congressman who was voted for at the same time, and the returns of such votes in the same poll-books, tally sheets and certificates, with those of the State officers. The general principle was declared, that Congress has full power to protect these books and other documents from danger of falsification, even though the conspirators had no intention of tampering with the returns of the poll-books and certificates of the ballots for the member of Congress, but on the contrary, had in view the falsifying the returns of the State officers only.

The defense argued that since the evil intent was not shown to have been specifically aimed at the returns of the vote for Congressman, the statutes of the United States could have no force so far as the infliction of any penalty is concerned ; that Congress had no power to provide for any punishment where no intent affecting the Congressional election was averred. This the Court denied : saying—

Second, that it is not competent for Congress to make the exercise of its punitive power dependent upon the legislation of the States.

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2. That this power, when so exercised, being exclusive of all interference therein by the States, must be so exercised as not to interfere with, or come in collision with, regulations presented in that behalf by the States, unless it provides for the complete control over the whole subject over which it is exercised.

3. That, when put in operation by Congress, it must take the place of all State regulations of the subject regulated, which subject must be entirely and completely controlled and provided for by Congress.

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It would be a very singular principle to establish, that, where a man was charged with a homicide, caused by maliciously shooting into a crowd with the purpose of killing some person against whom he bore malice, but with no intent to injure or kill the individual who was actually struck by the shot, he should be held excused because he did not intend to kill that particular person, and had no malice against him: MILLER, J., 127 U. S. 753.

[In this Coy case, Justice FIELD dissented from the extension of the general principle to the entire election. After alluding to the fact mentioned in Siebold's case (100 U. S. 393) by Justice BRADLEY, that convenience has induced the States to elect county and State officers at the same time as Representatives in Congress, Justice FIELD proceeded thus in his dissent—

According to the present decision, a conspiracy to persuade the officers of election to omit any duty imposed upon them under the laws of the State, though designed merely to affect the election of an inferior magistrate of a village, is an offence against the United States, punishable in the Federal Courts. Thus, obedience to the laws of the State, in matters of even local offices, if a member of Congress is voted for at the same election, may be enforced by the courts of the United States, instead of by the proper tribunals of the State whose laws have been violated. I am not able to assent to a doctrine which leads to this result, and gives the Federal courts power to intermeddle with the action of State officials in an election for local offices, whenever a member of Congress may have been voted for, at the same time. I agree to what is said by the Court, as to the temptations existing in a republican government, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, to control those elections by violence and corruption. But I do not perceive in that fact any reason why the punishment of fraud, committed or designed, at State elections, for State officers, should be transferred to the Federal courts: (127 U. S. 763.)

XI.

When a person is offering to vote, there is no law, State or National, authorizing his arrest, for any cause relating to his right of suffrage. But if he votes fraudulently, or falsely swears when put upon oath, he may be arrested afterwards at another time and place, and if found guilty, may be punished. At the polls, claiming and offering to vote, his right to be there for the purpose of voting is sacred, and his person inviolable: *U. S. v. Small* (1889), U. S. Circ. Ct., E. Dist. Va., 38 Fed. Repr. 103.

[This was an indictment of the judge of an election for unlawfully preventing a qualified voter from exercising his right of suffrage for Representative in Congress. The charge of the District Judge (HUGHES) is an interesting exposition of the right of the voter to approach the polls "free from all fear for his liberty and safety."

XII.

It is doubtful whether the rule, that penal statutes are to be construed strictly, has any application to the State and Federal laws regulating elections, as they merely regulate the conduct of general elections in the States and define the duties of the officers of elections. If these statutes, relating to the election of Representatives in Congress, taken as a whole, should be interpreted as penal, and strictly (and not remedial and to be liberally construed, in order to suppress the frauds and public wrongs against the ballot box), still the inquiry remains as to the intent with which the legislative department enacted these laws. The kindred rule must not be disregarded, that the intention of the lawmaker as gathered from the words employed, must govern the construction of all statutes: *In re Coy* (1887), U. S. Circ. Ct., Dist. Indiana, 31 Fed. Repr. 794; *Taylor v. U. S.* (1845), 3 How. (44 U. S.) 310; *U. S. v. Hartwell* (1868), 6 Wall. (73 U. S.) 385; that penal laws must not be construed so strictly as to defeat the obvious intention of the legislature, and the words of the statute narrowed to the exclusion of cases which these words in the ordinary acceptation or in that sense in which the legislature had obviously used them, would comprehend: *U. S. v. Wilberger* (1820), 5 Wheat. (18 U. S.) 76, 95; that the evident intention of the legislature ought not to be defeated by a forced and overstrict construction: *U. S. v. Morris* (1840), 14 Pet. (39 U. S.) 464; *Amer. Fur. Co. v. U. S.* (1829), 2 Pet. (27 U. S.) 358, 367.

[In this connection, reference should be made to section 5520 and its exposition (*supra*, page 363), where conspiracy to prevent voting is the subject matter.

[Hence, Justice BREWER construed the word "so" out of the concluding clause of section 5514: *supra*, page 353; and Judges

DILLON and CALDWELL construed "officer of election," not to include the Governor of a State: (*supra*, page 360.)

XIII.

[There are some rules which may be formulated from the special dangers to the ballot, as shown in the following paragraphs.

[In construing those sections of the Revised Statutes which have their origin in Act of Congress whose language has been varied in the revision, care should be taken to observe the principle of interpretation applied in the Munford cases (*supra*, page 361), where this variation in language was observed in passing upon the constitutionality of sections 2005, 2006 and 5506 of the Revised Statutes.

[In the same direction as the thought expressed by Judge WOODRUFF (*ante*, page 342), but more generally, upon the Eighteenth clause of Section 8 of the Constitution, the language of Justice MILLER may be observed :

That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power, by appropriate laws, to secure this election from the influence of violence, of corruption and of fraud, is a proposition so startling as to arrest attention and demand the greatest consideration.

If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption.

If it has not this power, it is left helpless before the two great natural and historical enemies of all republics,—open violence and insidious corruption.

The proposition that it has no such power, is supported by the old argument, often heard, often repeated, and in this Court, never assented to, that when a question of the power of Congress arises, the advocate of the power must be able to place his finger on the words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys, at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed.

This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of

the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted, and all other powers vested in the government, or any branch of it, by the Constitution ; Article I, sec. 8, clause 18 : *Ex parte Yarbrough* (1883), 110 U. S. 657, 658.

It was held in this case that Congress can by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation, and the Congressional election itself from corruption and fraud. That it is the duty of the government to see that the votes by which the members of Congress and its President are elected, shall be the free vote of the electors, and the officers thus chosen the free uncorrupted choice of those who have the right to take part in that choice.

[While Congress has this power to enact appropriate legislation, the Court will not sustain that which amounts to a net large enough to catch all possible offenders by deciding who are rightfully detained and who are to be set at large ; otherwise Congress would encroach upon the powers reserved to the people and the States : *U. S. v. Reese* (1876), 92 U. S. 214. This case was decided by a divided Court, Chief Justice WAITE writing the opinion with the concurrence of Justices SWAYNE, MILLER, DAVIS, FIELD, STRONG and BRADLEY. Justice HUNT dissented on the ground that the statute (of May 31, 1870, 16 Stat. at Large 140) should be construed according to the plain intent of Congress, and not so extensively as to include that which Congress could not meddle with ; that is, a general violation of the rights of an elector at a State election, which was the case in hand, no candidate for Congress being voted for. Justice CLIFFORD, agreed with the judgment but upon totally different grounds, chiefly technical ; Justice MILLER distinguished this judgment of the Court in the *Yarbrough* case : (*Supra*, pages 346, 348.) From this principle of interpretation, Justice FIELD also dissented in the Chinese case of *Baldwin v. Franks* (1887), 120 U. S. 678. Justice MILLER repeated the principle in the Trade Mark Cases of *U. S. v. Steffens, et al.* (1879), 100 U. S. 82, only to practically recede, so far as laws relating to Congressional elections, in the tax case (*supra*, page 348). This principle is, therefore, not likely

to be applicable to any statute relating to Federal elections, which has been at all carefully drafted.

XIV.

The contest for a seat in the House of Representatives is a proceeding unknown to State legislation and the State judiciaries; and violations of the law of Congress regulating it are offenses against the United States, and not against the State. Of such contests, the Federal Courts have exclusive jurisdiction: *Ex parte Dock Bridges* (1875), U. S. Circ. Ct., N. Dist. Ga., 2 Wood, 428. So, when an accused is charged before a State Court with perjury in having testified falsely before a notary public in a Congressional election case under the Revised Statutes, Title 2, Chapter 8, regulating the taking of testimony, he must be discharged, because such an offense is cognizable only to the Federal Courts under Section 5392, providing for the punishment of perjury in any case in which the laws of the United States authorize an oath to be administered, and the second section of the Judiciary Act of August 13th, 1888, 25 Stat. at Large 434, giving the United States Courts exclusive cognizance of all crimes cognizable under the authority of the United States. A notary public is a State officer, having power to administer any oath required by State law, and no other. He has no power to administer oaths required by Congress, unless he is expressly authorized to do so by Act of Congress, in doing which he acts as an officer of the United States, and not as an officer of the State; perjury committed before any officer in a contested Congressional election case is amenable to punishment under the United States law: *In re Loney* (1889), U. S. Circ. Ct., E. Dist. Va., 38 Fed. Repr. 101. The United States Supreme Court affirmed this judgment, as the testimony in a congressional contested election case is given in obedience to the laws of the United States and not of the State, and the accused should have been tried before the Federal Court, and not before the State Court.

D. H. PINGREY.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

INHABITANTS OF THE TOWNSHIP OF BERNARDS

V.

MORRISON ET AL.

1. As against *bona fide* holders of municipal bonds, which recite that they are issued in pursuance of a certain Act of the legislature which authorizes certain commissioners to borrow money on the faith and credit of the town, and execute bonds thereof, after a majority of the tax-payers had assented thereto, which fact should be proved by the affidavit of the town assessor, the defenses that the consent of a majority of the tax-payers was not given; that the affidavit of the assessor to that effect was not true; and that the commissioners did not borrow money on the bonds, but disposed of them without lawful consideration, are not availing.

2. The fact that the commissioners were special officers appointed for the purpose of issuing the bonds, by the Court, under the Act of the legislature, does not make their acts any less binding on the town. It is sufficient that full control was given them in the matter.

In error to the Circuit Court of the United States for the District of New Jersey.

A. A. Clark and *James R. English*, for plaintiff in error.
Courtlandt Parker, for defendants in error.

BREWER, J., March 3, 1890. This is an action on township bonds. Judgment was rendered against the township, and it alleges error. The bonds were issued under an Act approved April 9th, 1868, and found in the Sessions Laws of New Jersey for that year (page 915 *et seq.*). Outside of the obligatory words, this was the form of the bond:

"This bond is one of a series of like tenor, amounting in the whole to the sum of one hundred and twenty-seven thousand dollars, issued on the faith and credit of said Township in pursuance of an Act entitled "An Act to authorize certain towns in the counties of Somerset, Morris, Essex, and Union to issue bonds and take stock in the Passaic Valley and Peapack Railroad Company," approved April 9, 1868. In testimony whereof, the undersigned, Commissioners of the said township of Bernards, in the County of Somerset, to carry into effect the purposes and provisions of the said Act, duly appointed, commissioned, and sworn, have hereunto set

our hands and seals the 1st day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

JOHN H. ANDERSON, (L. S.)

JOHN GUERRIN, (L. S.)

OLIVER R. STEELE, (L. S.)

Commissioners.

Registered in the County Clerk's office.

WILLIAM ROSS, JR.,
County Clerk."

The first section of the Act provides that, upon the application in writing of twelve or more resident freeholders, the Circuit Court of the county shall appoint three resident freeholders to be Commissioners. Section two reads as follows:

That it shall be lawful for said Commissioners to borrow, on the faith and credit of their respective townships, such sums of money, not exceeding ten per centum of the valuation of the real estate and landed property of such township, to be ascertained by the assessment rolls thereof, respectively, for the year eighteen hundred and sixty-seven, for a term not exceeding twenty-five years, at a rate of interest not exceeding seven per centum per annum, payable semi-annually, and to execute bonds therefor under their hands and seals respectively; the bonds so to be executed may be in such sums, and payable at such times and places, as the said Commissioners and their successors may deem expedient; but no such debt shall be contracted or bonds issued by said Commissioners, of or for either of said townships, until the written consent shall have been obtained of the majority of the tax-payers of such township, or their legal representatives, appearing upon the last assessment roll, as shall represent a majority of the landed property of such township (including lands owned by non-residents) appearing upon the last assessment roll of such township; such consent shall state the amount of money authorized to be raised in such township, and that the same is to be invested in the stock of the said railroad company, and the signatures shall be proved by one or more of the Commissioners. The fact that the persons signing such consent are a majority of the tax-payers of such township, and represent a majority of the real property of such township, shall be proved by the affidavit of the assessor of such township endorsed upon, or annexed to such written consent, and the assessor of such township is hereby required to perform such service. Such consent and affidavit shall be filed in the office of the clerk of the county in which such township is situated, and a certified copy thereof in the town-clerk's office of such township, and the same, or a certified copy thereof, shall be evidence of the facts therein contained, and received as evidence in any court of this State, and before any judge or justice thereof.

By Section three these Commissioners were authorized to dispose of the bonds, and invest the money in railroad stock

in the name of the township, to subscribe for and purchase stock in the railroad company, and to act at stockholders' meetings. Section fourteen provides—

That all bonds issued in accordance with the provisions of this Act shall be registered in the office of the county clerk of the county in which the township is situated issuing the same, and the words "Registered in the County Clerk's office" shall be printed or written across the face of each bond, attested by the signature of the county clerk when so registered, and no bond shall be valid unless so registered.

It is conceded that the Commissioners were duly appointed; that the issue of bonds was not in excess of the amount authorized by the statute; that a paper purporting to contain the consent of the requisite number of tax-payers, duly verified by the affidavit of the township assessor, was filed in the office of the clerk of the county; and that the plaintiffs were *bona fide* holders. But the contention is, that the consent roll did not in fact contain the requisite number of tax-payers, and that the affidavit of the assessor was not true; also that the Commissioners did not borrow any money on the bonds, but disposed of them without lawful consideration. The Circuit Court held, that these defenses were unavailing against *bona fide* holders of the bonds; and with that ruling we concur. Indeed, all the questions which were earnestly presented and argued by counsel for plaintiffs in error have been often considered and decided by this Court. The Act gave the Commissioners power, under certain conditions, to issue the bonds. The recitals therein show that they were issued in pursuance of the Act, and the bonds were all duly registered as required. The case of *Montclair Twp. v. Ramsdell* (1883), 107 U. S. 147, 158, was a suit on bonds in form like the ones in suit, and issued under a statute practically identical. The validity of those bonds was sustained; and in the course of his opinion, speaking for the Court, Mr. JUSTICE HARLAN says—

Legislative authority for an issue of bonds being established by reference to the statute, and the bonds reciting that they were issued in pursuance of the statute, the utmost which plaintiff was bound to show, to entitle him, *prima facie*, to judgment, was the due appointment of the commissioners, and the execution by them in fact, of the bonds. It was not necessary that he should, in the first instance, prove either, that he paid value, or that the conditions preliminary to the exercise by the com-

missioners of the authority conferred by statute were, in fact, performed before the bonds were issued. The one was presumed from the possession of the bonds; and the other was established by the statute authorizing an issue of bonds, and by proof of the due appointment of the commissioners, and their execution of the bonds, with recitals of compliance with the statute.

See, also, the cases of *Bernards Twp. v. Stebbins* (1883), 109 U. S. 341, and *New Providence v. Halsey* (1886), 117 Id. 336, in which bonds, issued either under the Act before us, or that referred to in 107 U. S. (*supra*), were considered by the Court. Reference also may be made to two New Jersey cases, *Cotton v. New Providence* (1885), 47 N. J. Law, 401; *Mutual Benefit Life Ins. Co. v. Elizabeth* (1880), 42 Id. 235. It were useless to refer to the long list of cases in which recitals like these have been held sufficient to sustain bonds in the hands of *bona fide* holders. It is urged that these commissioners were not elected by the people; that they were not the general officers of the township, but were special officers appointed by the Circuit Court, special agents as it were, for the specific purpose; that the statute does not in terms give them authority to determine whether the preliminary conditions have been complied with; and that this case is therefore to be distinguished in these respects from those cases where similar recitals have been held conclusive. But though not the ordinary officers of the township, they were the ones to whom by legislative direction was given full authority in the matter of issuing bonds. The organization of townships, the number, character, and duties of their various officers, are matters of legislative control; and it is not doubtful that officers appointed represent the municipality as fully as officers elected. When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind the municipality. But these special commissioners were not the only officers of the township whose acts gave currency to these bonds. If inquiry had been directed to the county and township records, the affidavit of the township assessor to the consent required would have been found; and on the face of the bonds it appears that the county clerk of the county has added his

official certificate to their validity, so that the acts of general, as well as of special, officers and agents of the township, are the foundation upon which rests the validity of these bonds. While it is true that the Act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named. In the case of *Oregon v. Jennings*, (1886), 119 U. S. 74, 92, the rule is thus stated by Mr. JUSTICE BLATCHFORD—

Within the numerous decisions by this Court, on the subject, the supervisor and the town-clerk, they being named in the statute as the officers, to sign the bonds, and the corporate authorities to act for the town in issuing them to the company, were the persons intrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with.

Whatever may be the hardships of this particular case, to sustain the defenses pressed would go far towards destroying the market value of municipal securities. We see no error in the ruling of the Circuit Court, and its judgment is therefore affirmed.

FIELD, J., took no part in the decision of this case.

The cases collected in the following note are confined to the decisions of the United States Supreme Court, and relate only to the rights of *bona fide* holders of municipal bonds. It is a matter of common knowledge that the Supreme Court has always been exceedingly watchful of the interests of the innocent holder of municipal bonds, as contrasted with the State Courts who seem more favorably inclined toward the municipality. Yet it will be observed that the Federal courts, by reason of the multiplicity of cases, or perhaps from a gradual change of view, are less liberal to the investor

in this class of securities, than formerly, and the earlier are more frequently, and more carefully distinguished from those of later date.

Who are bona fide holders?

One who purchases bonds in open market, supposing them to be valid, and having no notice to the contrary, will be deemed a *bona fide* holder: *Galveston, Houston and Henderson R. R. Co. v. Coudrey* (1871), 11 Wall. (78 U. S.) 459.

A holder of bonds of the City of Ottawa, knowing that they were issued to aid a manufacturing company in the development of the

water power of the City which was not a corporate purpose within the meaning of the Constitution of Illinois, is not a *bona fide holder*, and the bonds as to him are void: *City of Ottawa v. Carey* (1883), 108 U. S. 110.

Irregularities or defects that do not prejudice the rights of bona fide holders.

In general, when the bonds on their face import a compliance with the law under which they are issued, the purchaser is not bound to look further for evidence of a compliance with the conditions of the grant of power.

Knox County v. Aspinwall et al. (1859), 21 How. (62 U. S.) 539, is the leading case. In that case it was held, that the failure of the sheriff to give notice of an election held for the purpose of determining upon the issue of bonds, could not prejudice the rights of a *bona fide* holder for value. The opinion of NELSON, J., rests upon the English case of "*The Royal British Bank v. Turquand* (1856), 6 Ellis & Bl. 327." This was an action upon a bond against the defendant as manager of a joint stock company. The defense was want of power under the deed of settlement or charter to give the bond. One of the clauses in the charter provided that the directors might borrow money on bonds in such sums as they should, from time to time, by a general resolution of the company, be authorized to borrow. The resolution passed was considered defective.

JERVIS, C. B., in delivering the judgment of the court, observed "We may now take it for granted that the dealings with these companies are not like dealing with other partnerships, and that the

parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so, on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document, appeared to be legitimately done."

Excess of issue over constitutional limitation of indebtedness.

In *Gelpcke v. Dubuque* (1864), 1 Wall. (68 U. S.) 175, it is held that the fact that the bonds were issued in an amount exceeding the constitutional limitation does not invalidate them in the hands of an innocent holder.—So in a suit brought by a *bona fide* holder for value to recover the amount of certain coupons of township bonds, it cannot be shown, as a defence to a recovery, that at the time of voting and issuing the series of bonds, the value of the taxable property of the township was not in amount sufficient to authorize the voting and issuing the whole series according to the State act which authorized their issue, where there is a recital in the bonds that the requirements of such act have been complied with: *Marcy v. Oswego Twp.* (1876), 92 U. S. 637, also *Humboldt Twp. v. Long* (1876), Id. 642 (MILLER, J., dissenting).

Irregularities in Election.

Where the County Court called the election instead of the sheriff as required by law, and all subsequent proceedings were regular,

held, that this irregularity did not invalidate bonds in the hands of *bona fide* holders: *Marshall Co. Board of Supervisors v. Schenck* (1867), 5 Wall. (72 U. S.) 772.

Notice of defects.

Where the bonds of the municipality had been issued pursuant to a *mandamus* to a railroad company, and subsequently the city obtained an injunction and order of the Court requiring the railroad company to deposit the bonds with a receiver, it was held, that, notwithstanding the pendency of said actions and the judgments and orders therein, the *prima facie* presumption, that the purchaser acquired the bonds without notice of defects in the inception of the instruments, was not overcome: *City of Lexington v. Butler* (1872), 14 Wall. (81 U. S.) 282.

A judgment of the Supreme Court of the State of New York in an action by the State against the town of Thompson, by which the bonds of the town were declared null and void, could not affect a *bona fide* purchaser for value of the bonds, who had no knowledge of the action: *Thompson v. Perrine* (1881), 103 U. S. 806.

Estopped by recitals.

In the case of *Lynde v. Winnebago County* (1873), 16 Wall. (83 U. S.) 6, the majority of the Court (CHASE, MILLER and FIELD, JJ., dissenting), held that where the County Judge was authorized by popular vote to *levy a tax* for the purpose of constructing a court house, to be extended over a period of not more than ten years, the power to borrow money and issue bonds therefor was implied; and the requisite popular sanction be-

ing set forth upon their face, and the judge being authorized to decide whether such sanction had been given, the county is estopped from denying the validity of the bonds in the hands of *bona fide* holders.

When the bonds of the City of Ottawa, contained recitals of the titles of ordinances under which they were issued which, in effect, assured the purchaser that they were for municipal purposes, with a previous sanction of a majority vote of the city; the city is estopped to say, as against a *bona fide* holder of the bonds, that they were not issued or used for a municipal or corporate purpose: *Hackett et al., Exr's. v. Ottawa* (1879), 99 U. S. 86.

In aid of Railways.

An Act of the Legislature of Texas provided that the City of Antonio might take stock of the San Antonio Railroad Company, and issue bonds to pay for the same. The subscription was made and bonds issued. The railroad was not built. Held, that the bonds were valid in the hands of a *bona fide* purchaser: *City of San Antonio v. Mehaffy* (1878), 96 U. S. 312.

So in County of Daviess v. *Huidekoper* (1879), 98 U. S. 113, it was held that the bonds of a county in Missouri are not void in the hands of a *bona fide* purchaser for value, because the railroad company, to which the bonds were issued in payment for its capital stock, was not created according to law, until subsequent to the favorable vote of the qualified voters, and the order of subscription.

Defects in Execution..

A town in Wisconsin issuing its bonds, is estopped, as against a *bona*

fide holder for value, to show that the true date of the bonds was different from that named in them, or that the town clerk, who was in office at the date of the bonds, in fact signed the bonds after he went out of office: *Weyauwega v. Ayling* (1879), 99 U. S. 112.

County bonds issued in Missouri by a *de facto* county court, and sealed with the seal of the Court, and signed by the *de facto* president, cannot be impeached in the hands of an innocent holder, by showing that the acting president was not *de jure* one of the justices of the Court: *Ralls Co. v. Douglass* (1882), 105 U. S. 728.

Defects and Irregularities that affect the rights of bona fide holders. Want of power.

Where, by authority of an Act of the Illinois Assembly providing that it shall be lawful for the agent of any corporate body "to subscribe to the capital stock of a railroad company," a County Supervisor subscribed for stock and issued certain bonds to a railroad company, as agent of the town, held, that the bonds were invalid, though in the hands of an innocent holder, for want of authority on the part of the municipal corporation to issue: *Township of East Oakland v. Skinner* (1877), 94 U. S. 255.

Where the charter of a Missouri railroad company authorized the taxable inhabitants of a "strip of country" to vote a tax in aid of the railroad company, and required the county court to levy and collect such tax, if voted, this gave no authority to the county to issue bonds, and bonds so issued are void though in the hands of a *bona fide* holder: *Ogden v. County of Daviess* (1881), 102 U. S. 634.

The City of Holly Springs subscribed for stock of a railroad company, and issued its bonds subsequent to a special election and a general ratification by the Legislature of previous subscriptions to stock; though not in violation of the Constitution, yet neither the election nor subscription was authorized by any Act of the Legislature, held, that the bonds were void in the hands of a *bona fide* holder for want of power to issue, and indefiniteness of ratifying Act: *Hayes v. Holly Springs* (1885), 114 U. S. 120.

Not estopped by recitals.

The Legislative journals of the State of Illinois did not contain the requisite evidence of the passage of the law under which the bonds of the town of South Ottawa were issued, held, that in the action to recover the amount due on the bonds, the town was not estopped to deny the existence of the law under which its bonds purport to have been issued. The fact that the holder was a *bona fide* purchaser does not affect their validity: *South Ottawa v. Perkins* (1876), 94 U. S. 260; *Buchanan v. Litchfield* (1880), 102 Id. 278.

Excess of constitutional limitation of indebtedness.

In the case of *Buchanan v. Litchfield* (*supra*), it was held, that, where the City of Litchfield issued its bonds to an amount in excess of the constitutional limitation of municipal indebtedness, in the absence of recitals in the bonds, representing on the part of the constituted authorities, that the constitutional requirements were met, the bonds were void though in the hands of a *bona fide* holder.

The case of *Di von v. Field* (1884), 111 U. S. 83, goes a step further. It held that bonds in the hands of *bona fide* holders are void, when issued to an amount in excess of the constitutional limitation of indebtedness, even though the recitals in the bonds are that they are conformable to law. In this case is cited *Buchanan v. Litchfield* (*supra*), and *Northern National Bank v. Porter* (1884), 110 U. S. 608. The point is made that the municipality will be estopped to deny the validity of bonds issued by it, only when the officers are authorized to ascertain and determine the existence of the facts upon which the recitals as to their validity are based: (*Contra*) *Dallas Co. v. McKenzie* (1884), 110 U. S. 686.

When a county court issued the bonds of a county to an amount in excess of the amount fixed by the commissioners, and approved by the majority vote of the electors of the county, the bonds, to the extent of the excess, are invalid in the hands of an innocent holder, though the bonds contained a recital that they were issued according to law and the ordinance of the Court: *County of Daviess v. Dickinson* (1886), 117 U. S. 657.

Unconstitutionality.

Bonds in the hands of a *bona fide* holder, issued by authority of an Act of the Legislature of West Virginia, authorizing the City of Parkersburg to loan the bonds to persons engaged in manufacturing, are void, by reason of the unconstitutionality of the Act: *City of Parkersburg v. Brown et al.* (1883), 106 U. S. 487.

A curative statute enacted by a Legislature having no constitutional authority to grant the new power,

except on a two-thirds vote of the city, will not make good the bonds of the city in the hands of a *bona fide* holder, if such vote has not been obtained: *Kalzenberger v. City of Aberdeen* (1887), 121 U. S. 172.

Defects in Execution.

When the law provides that a statute authorizing the issue of municipal bonds should not take effect until after its publication in a certain paper, and further that no bonds be issued under its authority until the question of their issue had been decided by popular vote upon thirty days notice, a bond which upon its face refers to the act, and shows that the notice of election was given before the act went into effect, is void, even in the hands of an innocent purchaser. *McClure v. Oxford Twp.* (1877), 94 U. S. 429.

When an act of the General Assembly of Missouri, passed March 30th 1872, provided that any bonds thereafter issued should be registered with the State Auditor, held, that bonds actually issued in October, 1872, but antedated as of March 28th 1872, and not registered with the State Auditor, were invalid in the hands of an innocent holder: *Anthony v. County of Jasper* (1880), 101 U. S. 693.

Where an examination of the records would have shown that the bonds were not issued on the day recited as their date, and that the person who signed them was not the Mayor at the time they were signed, the facts that the records would show that the person signing them was Mayor on the day of their date, and that the statutes and ordinances referred to in the bonds authorized their issue, and that the

indorsements showed they had been registered, will not aid the purchaser, as even *bona fide holders* of municipal bonds, must take the risk of the official character of those

who executed them : *Cole v. City of Cleburne* (1889), 131 U. S. 162.

C. H. CHILDS.

Minneapolis, Minn.

MUNICIPAL BONDS have also been the subject of leading articles and annotations in THE AMERICAN LAW REGISTER, wherein the subject has been more generally treated, viz:—

RAILROAD AID BONDS in the Supreme Court of the United States, by James F. Mister, of Kansas City, Missouri ; a leading article discussing the decisions of the Supreme Court of Missouri and their misconception by the Supreme Court of the United States : vol. 17, page 209.

CONSTRUCTION OF STATUTORY POWERS IN BOND CASES IN THE SUPREME COURT OF THE UNITED STATES, by the same author ; a leading article continuing the same subject, and discussing the doctrine of the Supreme Court of the United States as unwarranted and subversive of the law of powers applicable to cases of special agency, and as an unwarrantable application of the law of estoppel : vol. 17, page 609.

THE AUTHORITY AND STEPS TOWARDS THE ISSUANCE OF MUNICIPAL BONDS, by Adelbert Hamilton, of Chicago ; an annotation to the case of *Rouede v. The Mayor of Jersey City* (1884), in the U. S. Circ. Ct., N. Dist. N. J., which was a case of a *bona fide* holder of such a bond : vol. 23, page 306.

ON MUNICIPAL SUBSCRIPTIONS TO THE STOCK OF RAILROAD COMPANIES ; a leading article discussing, in 1853, the opinion of the Supreme Court of Pennsylvania in the case of *Sharpless et al. v. The Mayor* (1852), 21 Pa. 147 ; S. C. 2 AMERICAN LAW REGISTER (O. S.) 27, 85, where the right of a municipality to subscribe for railroad bonds was sustained : vol. 2, (O. S.) page 1.

Supreme Judicial Court of Massachusetts.

QUIMBY v. BOSTON & M. R. CO.

A railroad company is not liable for an injury sustained through the negligence of its servants, by a person who is traveling on a free pass containing an exemption from liability by injury from accident.

If such pass contemplates the placing upon it of the signature of the user, this provision is designed to secure complete evidence of the user's assent to its terms, and if he is allowed to travel without signing the pass, the user cannot be allowed to deny his assent to the company's exemption.

Such exemption is not contrary to public policy and the contract is valid.

Report from the Superior Court of Essex County.

An action of tort by Asahel Quimby against the Boston & Maine Railroad, for personal injuries sustained in a collision upon its railroad.

H. P. Moulton, for plaintiff.

S. Lincoln, for defendant.

DEVENS, J., January 1, 1890. When the plaintiff received his injury, he was traveling upon a free pass given him at his own solicitation, and as a pure gratuity, upon which was expressed his agreement that, in consideration thereof, he assumed all risk of accident which might happen to him while traveling on, or getting off, the trains, of the defendant railroad corporation, on which the ticket might be honored for passage. The ticket bore on its face the words, "provided he signs the agreement on the back hereof." In fact, the agreement was not signed by the plaintiff, he not having been required to do so by the conductor who honored it as good for the passage, and who twice punched it. The fact that the plaintiff had not signed, and was not required to sign, we do not regard as important. Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not: *Squire v. Railroad Co.* (1867), 98 Mass. 239; *Hill v Railway Co.* (1887), 144 Id. 284; *Railroad Co. v. Chipman* (1888), 146 Id. 107. The object of the provision as to signing is to furnish complete evidence that the person to whom the pass is issued assents thereto: but one who actually avails himself of such a ticket, and of the privileges it confers, to secure a passage, cannot be allowed to

deny that he made the agreement expressed therein, because he did not, and was not required to sign it: *Railway Co. v. McGown* (1886), 65 Tex. 643; *Railroad Co. v. Read* (1865), 37 Ill. 484; *Wells v. Railway Co.* (1862), 24 N. Y. 181; *Perkins v. Railway Co.* (1862), Id. 196.

If this is held to be so, the case presents the singly inquiry whether such a contract is invalid, which has not heretofore been settled in this State, and upon which there has been great contrariety of opinion in different courts. If the common carrier accepts a person as a passenger, no such contract having been made, such passenger may maintain an action for negligence in transporting him, even if he be carried gratuitously. Having admitted him to the rights of a passenger, the carrier is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to those who have paid him for the service: *Files v. Railroad Co.* (1889), 149 Mass. 204; *Todd v. Railroad Co.* (1861), 3 Allen (Mass.) 18; *Com. v. Railroad Co.* (1871), 108 Mass. 7; *Littlejohn v. Railroad Co.* (1889), 148 Id. 478; *Railroad Co. v. Derby* (1852), 14 How. (55 U. S.) 468; *The New World v. King* (1853), 16 Id. (57 U. S.) 469. But the question whether the carrier may, as the condition upon which he grants to the passenger a gratuitous passage, lawfully make an agreement with him by which the passenger must bear the risks of transportation, obviously differs from this.

In a large number of cases the English decisions, as well as those of New York, have held that where a drover was permitted to accompany animals upon what was called a "free pass," issued upon the condition that the user should bear all risks of transportation, he could not maintain an action for an injury received by the negligence of the carrier's servants. A similar rule would without doubt be applied where a servant, from the peculiar character of goods, as delicate machinery, was permitted to accompany them, and in other cases of that nature. That passes of this character are "free passes," properly so called, has been denied in other cases, as the carriage of the drover is a part of the contract for the carriage of the animals. The cases on this point were carefully examined and criticised by Mr. Justice BRADLEY in *Railroad Co. v. Lock-*

wood (1873), 17 Wall. (84 U. S.) 367, and it is there held that, such a pass is not gratuitous, as it is given as one of the terms upon which the cattle are carried. The decision is put upon the ground that the drover was a passenger carried for hire, and that with such a passenger a contract of this nature could not be made. The Court, at the conclusion of the opinion, expressly waives the discussion of the question here presented, and, as it states, purposely refrains from expressing any opinion as to what would have been the result had it considered the plaintiff a free passenger instead of one for hire. *Railway Co. v. Stevens* (1878), 95 U. S. 655, in which the same distinguished judge delivered the opinion of the Court, is put upon the ground that the transportation of the defendant, although not paid for by him in money, was not a matter of charity or gratuity in any sense, but was by virtue of an agreement in which the mutual interest of the parties was consulted.

Whether the English or New York authorities rightly or wrongly hold that one traveling upon a "drover's pass," as it is sometimes called, is a free passenger, they show that in the opinion of these courts, a contract can properly be made with a free passenger that he shall bear the risks of transportation. This is denied by many courts whose opinions are entitled to weight. It will be observed that in the case at bar there is no question of any willful or malicious injury, and that the plaintiff was injured by the carelessness of the defendant's servants.

The cases in which the passenger was strictly a free passenger, accepting his ticket as a pure gratuity, and upon the agreement that he would himself bear the cost of transportation, are comparatively few. They have all been carefully considered in two recent cases, to which we would call attention. These are *Griswold v. Railway Co.* (1885), 53 Conn. 371, and that of *Railway Co. v. McGown* (1886), 65 Tex. 643, in which the precise question before us was raised, and decided, after a careful examination of the authorities, in a different manner by the highest court of Connecticut, and that of Texas. No doubt existed in either case, in the opinion of the court, that the ticket of the passage was strictly a gratuity, and it was held by the former court that, under these circumstances, the carrier and the passenger might lawfully agree that, the passenger should

bear the risks of transportation, and that such agreement would be enforced, while the reverse was held by the court of Texas. We are brought to the decision of the question unembarrassed by any weight of authority without the commonwealth that can be considered as preponderating.

It is urged on behalf of the plaintiff that while the relation of passenger and carrier is created by contract, it does not follow that the duty and responsibility of the carrier are dependent upon the contract; that while, with reference to matters indifferent to the public, parties may contract according to their own pleasure, they cannot do so where the public has an interest; that as certain duties are attached by law to certain employments, these cannot be waived or dispensed with by individual contracts; that the duty of the carrier requires that he should convey his passengers with safety; that he is properly held responsible in damages if he fails to do so by negligence, whether the negligence is his own or that of his servants, in order that this safety may be secured to all who travel. It is also said that the carrier and the passenger do not stand upon an equality; that the latter cannot stand out and higgie or seek redress in courts; that he must take the alternatives the carrier presents, or practically abandon his business in the transfer of merchandise, and must yield to the terms imposed on him as a passenger; that he ought not to be induced to run the risks of transportation, for being allowed to travel at a less fare, or for any similar reason, and thus to tempt the carrier or his servants to carelessness, which may affect others as well as himself; and that, in a few words, public policy forbids that contracts should be entered into with a public carrier by which he shall be exonerated from his full responsibility. Most of this reasoning can have no application to a strictly free passenger, who receives a passage out of charity or as a gratuity. Certainly the carrier is not likely to urge upon others the acceptance of free passes, as the success of his business must depend on his receipts. There can be no difficulty in the adjustment of terms where passes are solicited as gratuities. When such passes are granted by such of the railroad officials as are authorized to issue them, or other public carriers, it is in deference largely to the feeling of

the community in which they are exercising a public employment. The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares, in both of which subjects the public is interested. In such instances one who is ordinarily a common carrier does not act as such, but is simply in the position of a gratuitous bailee. The definition of a "common carrier," which is that a person or corporation pursuing the public employment of carrying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger, he consents, for the time being, to put off his public employment, and to do that which it does not impose upon him.

The plaintiff was in no way constrained to accept the gratuity of the defendant. It had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, also to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that, besides the gift of free transportation, the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case, the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him.

In some cases it has been held that while a carrier cannot limit his liability for gross negligence, which has been defined as his own personal negligence (or that of the corporation it-

self, where that is the carrier), he can contract for exemption from liability for the negligence of his servants. It may be doubted whether any such distinction in degrees of negligence, and the right of a carrier to exempt himself from responsibility therefor, can be profitably made or applied: *The New World v. King* (1853), 16 How. (57 U. S.) 469. It is to be observed, however, that in the case at bar the injury occurred through the negligence of defendant's servants, and not through any failure on the part of the corporation to prescribe proper rules or furnish proper appliances of the conduct of its business.

We are of opinion that where one accepts, purely as a gratuity, a free passage upon a railroad train, upon the agreement that he will assume all risk of accident which may happen to him, while traveling on such train, by which he may be injured in his person, no rule of public policy requires us to declare such contract invalid and without binding force. By the terms of the report there must therefore be judgment for defendant.

The question involved in the principal case, as to the validity of a contract between a carrier of passengers and a traveler, by which the latter, in consideration of a free pass being granted to him, relieves the former from all responsibility for any injury he may sustain, is one of great importance as affecting the whole traveling community.

It is much to be regretted that any conflict of opinion should exist upon a matter of such vital interest. There is no doubt however that the authorities differ, although their weight would seem to be against the validity of such contracts.

In New York State, where such contracts are upheld, very strong dissenting opinions have been delivered.

In *Welles v. The New York Central R.R. Co.* (1862), 24 N. Y. 181,

the plaintiff, a gratuitous passenger, was injured while traveling on a free pass exempting the company from all liability. On the ticket the following words were printed, "The person accepting this free ticket assumes all risk of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket." Here the Court held such contract good, and the defendants not liable for the injuries sustained by the plaintiff. This view was taken by Justices GOULD, DENIO, DAVIS, ALLEN, and SMITH, while Justice SUTHERLAND delivered a strong dissenting opinion, wherein he remarks: "After a careful consideration of this important question, I have come to the conclusion that the contract is il-

legal and void, and should be held to be so, as against public policy, as declared both by the common law, and statute law. * * It can also be said that such contracts are void as against the policy of the law punishing such breaches of the peace as misdemeanors." After pointing out the degree of care to be exercised by carriers of passengers, independent of fare or other consideration, he proceeds thus: "Would it be consistent with the requirements of the law or its policy, to permit railroad corporations to make and enforce contracts with their passengers tending to promote a relaxation of the very care in the selection of their employes and otherwise, which is the object of this requirement of the law to secure? * * All laws punishing crimes against the person, and against the public health, show that the life and health of a citizen is a matter of public consideration. That its citizens constitute the strength and wealth of a State, is an elementary principle of political economy. It certainly cannot be said that a man has either a moral or legal right to speculate with his own life; or to make any contract tending to remove the safeguards which the law places around it. It is plain to me, from the above general considerations, that the extraordinary liability of the defendants in damages for negligence as carriers of passengers, was not declared by law, nor is it enforced by law, for the benefit only of the party injured in any particular case; but it was declared, and is enforced, for the benefit of the public also; and therefore, a passenger can not by contract, in advance of the injury, lay aside even his individual benefit from the law or rule of liability."

In this view Justice WRIGHT, concurred.

Perkins v. The New York Central R.R. Co. (1862), 24 N. Y. 196, was also a case of a gratuitous passenger, injured while traveling on a similar ticket. Here the Court also held that the endorsement exempted the company from all kinds of negligence of its agents, gross as well as ordinary, and went so far as to say that practically, in truth, there is no distinction in the degrees of negligence. In his opinion Justice E. D. SMITH observes:—"They [the company] were, and are, not bound to carry him [the passenger] or any other person gratuitously, but, undertaking to carry him, they must do it carefully as with other passengers." He referred to *Coggs v. Bernard* (*infra*); *Nolton v. The Western R.R. Co.* (1857), 15 N. Y. 444, and *Gellinwater v. The Madison and Indianapolis R.R. Co.* (1854), 5 Ind. 340, in support of this contention. In speaking of the ticket and the notice thereon, he proceeds: "It ought not to be considered as applying to such risks as could not have been within the intent, and contemplation, of the parties, and cannot apply to such as are not within the legitimate compass of contract, upon principles of public policy." He considered, however, that there had been an express contract made, and that the passenger became "his own insurer," and had absolved the company in advance from all liability "for any injury to his person" from such negligence. In this opinion he was supported by Chief Justice SELDEN, who drew a distinction between the negligent acts of the directors and those of their officers or agents, saying, "No contract * * can exempt a railroad company

from liability for the wilful or wanton misconduct or gross recklessness of its directors, but the rule extends to no other officer or agent of the company." Justices DENIO, DAVIS, ALLEN, and GOULD, concurred.

The law as defined in the New York cases holding such contracts valid, is followed in New Jersey: *Kinney et al. Adm'rs v. The Central RR. Co. of New Jersey* (1869), 34 N. J. Law 513, which was a case of a free pass with an agreement stipulating that, in consideration of the same, the passenger assumed all risk of accident, and that the company should not be liable under any circumstances. Justice VAN SYCKEL maintains the validity of such contracts in the following language,—“The objection that this contract is inconsistent with good morals and sound policy has been considered in all the cases of this kind which have been submitted to judicial criticism. It differs widely from the question whether a person should be allowed to stipulate against a loss from his own negligence. Reasons of great cogency could be started against the validity of such a contract which can have no pertinency to this issue. * * * Why should the passenger who solicits a free pass be permitted to escape the liability to loss which he voluntarily assumes in order to secure the accommodation? It is certainly a breach of good faith in the passenger, to attempt to fix the carrier with responsibility in such a case.”

The same ruling is followed in Connecticut: *Griswold Adm'r v. The New York and New England RR. Co.* (1885), 35 Conn. 371, also a case of a passenger traveling on a free pass with a condition exempt-

ing the company from all liability. The remarks of Justice LOOMIS show that he considered the agreement as dissolving the position of carrier and passenger, and creating that of an ordinary bailor and bailee. He says,—“In the first place, the arrangement between the parties ought not to be regarded as a contract with the railroad company in its character as a common carrier, and therefore the stipulated exemption is no abdication of that rigid responsibility which the law imposes on common carriers. The gratuitous accommodation concerns only the immediate parties, unless in a very indirect way, by making the fare of the other passengers higher.”

Pausing for one moment to consider these remarks, it will be found that even supposing the relationship of the parties is changed by such a contract, and the carrier becomes a gratuitous bailee, he will still be liable for any injury sustained through negligence in himself or his servants, upon the principle laid down in the famous case of *Coggs v. Bernard* (1704), 2 Ld. Raym. 909, where it was decided that the confidence induced by undertaking any service for another, is a sufficient consideration to create a duty in the performance of it, even though the act be gratuitous.

This is clearly shown by the case of *Todd v. The Old Colony and Fall River RR. Co.* (1861), 3 Allen (Mass.) 18, where the plaintiff was a gratuitous passenger lawfully upon the defendants cars. Chief Justice BIGELOW, saying,—“The defendants having undertaken to transport the plaintiff in their cars, were bound to the use of due and seasonable care in performing a duty which they had voluntarily assumed;

and if, by omitting to take such precautions as were necessary and proper to prevent a person exercising due care, from receiving an injury, the plaintiff was injured, he is entitled to recover compensation." The cases of *Fairmount and Arch Street Passenger Ry. Co. v. Stuller* (1867), 54 Pa. 375, wherein it was held that the duty to carry safely, is a duty the company owe; *Wilton v. Middlesex RR. Co.* (1871), 107 Mass. 108, where the plaintiff was riding on a street car gratuitously at the driver's invitation; *The Ohio and Mississippi RR. Co. v. Muhling* (1861), 30 Ill. 9, a case of a workman of the company injured while traveling on the road in pursuit of his own business, without having paid any fare, are to the same effect.

Further, with respect to the gratuitous accommodation concerning only the immediate parties. Does the degree of care which is bound to be exercised by a carrier of passengers, and especially by a railroad company, depend upon the relationship existing between the carrier and the passenger? It exists independently of any contract, for, says the Court, in *Moreland v. Boston and Providence RR. Co.* (1886), 141 Mass. 31, "The degree of care is not fixed solely by the relation of carrier and passenger, it is measured by the consequences which may follow the want of care." For this reason, therefore, such contracts ought not to be sustained. So, in *Welles v. The New York Central RR. Co.* (1862), 24 N. Y. 181, Justice SUTHERLAND, in his dissenting opinion, points out that the law requires of carriers of passengers all the care that human foresight is capable of, and that the duty to use this extraordinary care

is a legal duty, independent of any contract with, or fare or consideration paid by, their passengers, and that as carriers of passengers as well as of property, they may be considered as acting in a public capacity, and as a kind of public officers. To the same effect are the words of Justice JUDGE in *Mobile & Ohio RR. Co. v. Hopkins* (1868), 41 Ala. 489; also those of Justice FIELD in the case of *Hannibal & St. Joseph RR. Co. v. Swift* (1871), 12 Wall. (79 U. S.) 261, where he says: "They [the obligations] were imposed upon it [the company] by the law, from the public nature of its employment, independent of any contract."

Again, in *The Philadelphia & Reading RR. Co. v. Derby* (1852), 14 How. (55 U. S.) 486, a case of a free passenger, one of the Company's stockholders, who was injured while being taken over the road to examine its condition, Justice GRIER says, "the liability of the defendants below [the company], for the negligent and injurious act of their servant, is not necessarily founded on any contract or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other. It is true, a traveler by stage coach, or other public conveyance, who is injured by the negligence of the driver, has an action against the owner, founded on his contract to carry him safely. But the maxim of *respondet superior*, which, by legal imputation makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any relation between the injured party and the master * * This duty [to carry safely] does not result alone from the consideration paid for the service. It is imposed by

the law, even where the service is gratuitous."

It will be observed that in the opinion in the New Jersey case (*supra*, page 393) it is said that such a case differs widely from the question whether a person should be allowed to stipulate against loss from his own negligence and that it would be a breach of good faith to attempt to fix the carrier with responsibility in such a case. The question, however, arises. Has not public policy something to do with the matter? Has not the State as *parens patriae* an interest in the lives and limbs of its subjects?

The lives and health of individuals when traveling by railroad, are entirely in the hands, and at the mercy, of such companies. The traveler is powerless and without any means of helping himself even if he could or would. He has no means of knowing whether the road over which he has to travel is in proper condition or not, he has no power to examine the engine and coaches of the train to satisfy himself that they are in full working order and repair, neither can he regulate the rate of speed at which the train shall travel; it may be run at an improper speed in order to make lost time, and accidents may thereby be occasioned, yet he is powerless to prevent it and cannot interfere. Through these and other means, unmistakably negligence on the part of the carrier, his agents and employes, accidents, and it may be truly said the majority of them, occur. It is therefore contended that such companies, as public servants, ought not to be allowed to contract themselves out of all liability, and that, on the ground and on considerations of public policy, they are properly held liable

even to a gratuitous passenger traveling upon a free conditional pass or a special contract, for negligence in themselves, their agents and other employes.

This contention is supported by the dissenting opinions of Justices SUTHERLAND and WRIGHT, in *Welles v. The New York Central R.R. Co.* (*supra*), also by the opinion of Justice SMITH in *Perkins v. The New York Central R.R. Co.* (*supra*), and by the cases hereinafter mentioned.

A railroad company, as well as any other carrier of passengers, is held to a stringent duty and responsibility, and the degree of duty is obviously to be measured by the dangers which attend the carriage, and the control which the carrier lawfully exercises over both vehicles and roadway. A carrier of passengers by coach, on a public highway, would be accountable for the negligence of the person whom he places in charge of the vehicle, and his own also, if injury occurs from the unfitness or defectiveness of such vehicle. A carrier of passengers on a railroad (such road being operated by the carrier), is responsible for the negligence of his agents and employes in charge of the vehicles, and the railroad also, and his accountability extends not only to the conduct and management of the railroad, so far as relates to the transit, but also to the sufficiency of the vehicles and the roadway itself. When a railroad company is the carrier, the duty rests on such company, not only to provide safe vehicles, but a safe roadway; and in view of the dangers which attend railroad carriage, its duty is not limited to such precautions as it is apparent, after an accident, might have prevented the

injury, but to such as would be dictated by the utmost care and prudence of a very cautious person before the accident, and without knowledge that it was about to occur: *per* Justice WRIGHT, in *Smith Adm'r v. The New York Central RR. Co.* (1862), 24 N. Y. 222.

The responsibility thus cast upon railroad companies and other carrier of passengers, is thrust upon them out of considerations of public policy, for, says the Court in *The Pennsylvania RR. Co. v. Marion* (1885), 104 Ind. 239, a railroad company must, "out of considerations of public policy," exercise the highest diligence for the benefit of the passenger while in the actual progress of his journey.

So vigilant is the law in this respect, and all on account of public policy, that it has been held that railroad companies must employ the very best possible well-known means and appliances, to insure the safety of the public: *Pendleton Street RR. Co. v. Shiress* (1868), 18 Ohio St. 255. And for the same reasons, they "must keep pace with science and art, and modern improvements, in their application to the carriage of passengers, but they are not responsible for the unknown as well as the new:" *per* Justice AGNEW in *Meier v. The Pennsylvania RR. Co.* (1870), 64 Pa. 225.

Seeing then, that such responsibility does not depend upon contract; that the duty the carrier owes to his passengers is cast upon him by law, out of considerations of public policy, as a means of public safety; that he acts in a public capacity as a public servant; and that the maxim *respondeat superior* is independent of any contract; is it not contrary to public policy, and

the principles which govern the carrier's duties, to allow such contracts to stand?

It is true, that persons may enter into whatever contracts they please, but to this principle of law there is a proviso, which says, that in so doing, they must not violate any legal or moral obligation, or impair any public interest, for, if the tendency of such contracts be to impair public interest, they are against public policy and void: *Smith Adm'r v. The New York Central RR. Co.* (1862), 24 N. Y. 222.

It would seem that the tendency of such contracts is toward the violation of both a legal and moral duty and to impair public interest. This contention is clearly upheld by Justice WELLES, in *Parsons v. Montieth* (1851), 13 Barb. (N. Y.) 353, in these words:—"A contract which should excuse a carrier from his own fraud or gross negligence, would be *contra bonos mores*, and void. So, of contracts for the violation of any law, common or statute." See also *Steinweg v. The Erie Ry.* (1870), 43 N. Y. 123.

In *Pennsylvania RR. Co. v. McCloskey's Adm'r* (1854), 32 Pa. 526, the same principle is contended for, the Court saying:—"Assuming that a public company of carriers may contract for other exemptions from liability than those allowed by law, still such a contract will not exempt from liability for gross negligence."

Such a contract cannot relieve them from ordinary care in the performance of their duty; and the most that it can do, is to relieve them from those conclusive presumptions of negligence which arise when the accident is not inevitable, even by the highest care, and to require that negligence be

actually proved against them: *per* LOWRIE, C. J., in *Goldey v. The Pennsylvania RR. Co.* (1858), 30 Pa. 242; followed in *Powell v. The Pennsylvania RR. Co.* (1859), 32 Id. 414; *Farnham et al. v. The Camden & Amboy RR. Co.* (1867), 55 Id. 53; *The American Express Co. v. Sands* (1867), Id. 141; *Empire Transportation Co. v. Wamsutta Oil Refining and Mining Co.* (1870), 63 Id. 14. The same rule has been followed in *The Illinois Central RR. Co. v. Morrison* (1857), 19 Ill. 136 (*infra*); *The Indiana Central RR. Co. v. Mundy* (1863), 21 Ind. 48; *Squire v. The New York Central RR. Co.* (1867), 98 Mass. 239; *Hadley v. The Northern Transportation Co.* (1874), 115 Id. 304; *Welsh v. The Pittsburg, Fort Wayne & Chicago RR. Co.* (1859), 10 Ohio St. 65; *Union Express Co. v. Graham* (1875), 26 Id. 595; *Gaines v. The Union Transportation and Insurance Co.* (1876), 28 Id. 418, wherein Justice JOHNSON said—"He cannot by such a stipulation, relieve himself from responsibility for losses caused by his own negligence or want of care or skill, and the burden of proof is upon the carrier to show not only a loss within the terms of the exemption, but also that proper care and skill were exercised to prevent it."

The same rule is upheld in West Virginia, *The Ballimore & Ohio RR. Co. v. Skeels* (1869), 3 W. Va. 556, wherein Justice BERKSHIRE states the law as follows: "By express stipulation in the contract to that effect, they may, at least, exonerate themselves from all liability that does not arise from the want of ordinary care and diligence on their part."

This question is perhaps nowhere

better stated than by Justice BRADLEY, in *The New York Central R. Co. v. Lockwood* (1873) 17 Wall. (84 U. S.) 367, as follows: 1. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. 2 That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servants. 3. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Special attention should here be called to this last case, inasmuch as Justice BRADLEY states that the Court "purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire." The case was one of the drover class, and the Court held that a drover traveling on a pass, for the purpose of taking care of his stock on the train, was a passenger for hire, his passage being one of the mutual terms of the arrangement for carrying his cattle.

Although these cases differ from those of purely gratuitous passengers, yet a short examination of the opinion, especially when read with his opinion in *The Grand Trunk Ry. of Canada v. Stevens* (*infra* page 402) may be found useful as showing that such contracts, in so far as they seek to relieve the company from liability for negligence of itself and its servants, are contrary to public policy and void. Mr. Justice BRADLEY's language is forcible, and it is submitted that when read as before indicated, might equally apply to the

case of a free passenger: "Conceding * * that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them from all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence, an excuse so repugnant to the law of their foundation and to the public good, they have no longer any plea of justice or reason to support such a stipulation, but the contrary." Proceeding, he remarks, "Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation." The Court came to the conclusion that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

The same is the ruling of the Court in the case of *The Illinois Central R.R. Co. v. Morrison* (1857), 19 Ill. 136, wherein it was held that a railroad company cannot excuse itself from liability for gross negligence or wilful misfeasance, against which good morals and public policy forbid that they should be permitted to stipulate.

In *Mobile & Ohio R.R. v. Hopkins* (1868), 41 Ala. 489, a case of a free pass in consideration of the passenger assuming all responsibility, Justice JUDGE, refuses the

declaration made by Justice LOOMIS in the New Jersey case (*supra*) to the effect that the contract was not made with the company in its capacity of a carrier of passengers, and expresses himself thus: "The relation of common carrier and passenger certainly subsists between the parties, notwithstanding the contract. * * In undertaking the performance of gratuitous transportation, the common carrier can no more stipulate for exemption from liability for damages occasioned by the negligence or wilful default, or tort, of himself or his servants, than he can when he receives a reward for the services to be performed; both are alike prohibited by a sound public policy, which also forbids a gratuitous bailee, not bound by the considerations of public duty attached to the office of a common carrier, from stipulating that he may be fraudulently negligent or safely dishonest. Railroad companies are incorporated, in part at least, from public considerations, and for the public good. * * * The exercise of honesty, care and diligence, by them or their agents and employes, is a *public duty* resulting from their position, the obligation to perform which cannot be thrown off by contract. If thus thrown off, the effect would be to relax, or modify, the performance of the duty, and to promote a relaxation of proper care in the selection of agents and servants for its performance." He further adds, "A common carrier cannot exempt himself, by any such contract, from liability for the negligence, wilful default, or tort, of himself or his servants, and upon this familiar principle, that whatever has an obvious tendency to encourage guilty negligence, fraud, or crime, is contrary to public policy."

The case of *The Pennsylvania RR. Co. v. Butler* (1868), 57 Pa. 335, was also one of the same class, Justice SHARSWOOD, stating—"It is too well settled to be controverted that a stipulation by a common carrier that he shall not be liable for damages, does not relieve him from responsibility for actual negligence by himself or his servants."

In *Knowlton v. The Erie Ry. Co.* (1869), 19 Ohio St. 260, the Court held that the company were not liable, as the contract was made within the jurisdiction of the laws of New York, and was to be decided according to the law of that State, pursuant to the well-known rule, that contracts must be construed according to the law of the country where they are made, and in which they are to be performed; and on no other principle, as is clearly shown by the remarks of Justice SCOTT, which prove the law to be the reverse in Ohio: "It has been repeatedly held by this Court, that a common carrier cannot, in this State, even by express contract, relieve himself from liability for injuries caused by his own negligence, or that of his servants in the discharge of the duties of his employment."

The case of *Jacobus v. The St. Paul & Chicago Ry. Co.* (1873), 30 Minn. 125, was also one in which the plaintiff held a free conditional pass, which the Court decided did not relieve the company from responsibility, Justice BERRY, in delivering a very strong opinion, saying, "There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is, the regard for the safety of the passenger on his own account, and the other is, a regard

for his safety as a citizen of the State. The latter is a consideration of public policy, growing out of the interest which the State or government as *parens patriae* has in protecting the lives and limbs of its subjects. * * So far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its nature. No stipulation of the parties, in disregard of it or involving its sacrifice in any degree can then be permitted to stand. Whether the case be one of a passenger for hire—a merely gratuitous passenger—or a passenger upon a conditional free pass, as in this instance—the interest of the State in the safety of the citizen is obviously the same. The more stringent the rule, as to the duty and liability of the carrier, and the more rigidly enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and it may be said inevitably, tends to bring about a corresponding relaxation of care and diligence. We can conceive of no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned."

These principles are further supported by the decision of the Iowa Court in *Rose v. Des Moines Valley R R. Co.* (1874), 39 Iowa 246, another case of a passenger with a free conditional ticket; wherein Chief Justice MILLER expressed himself as follows: "The weight of American authority is, that a common carrier cannot by notice or special contract, restrict, limit or avoid its common law liability for negli-

gence." And after reviewing the authorities *pro* and *con.*, the learned Judge proceeded: "In our opinion the better doctrine is that announced in *Philadelphia and Reading R.R. Co. v. Derby* (*infra*), and the cases in accord therewith. Besides, and independently of the adjudicated cases, upon the broad and unqualified provisions of our statutes * * we are of opinion that a common carrier by railroad, whether gratuitous or for the usual or other charges or compensation, is liable for injuries sustained in consequence of the negligence of its employes engaged in the work of operating the road."

The statute referred to in the above opinion (Revised Stat. Iowa p. 455 ed. 1888) provides, "SEC 1307. Every corporation operating a railway shall be liable for all damages sustained, by any person, including the employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers, or other employes of the corporation, and in consequence of the wilful wrongs, whether of commission or omission of such agents, engineers, or other employes, where such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

The language of Justice GRIER in *The Philadelphia & Reading R.R. Co. v. Derby* (*supra*) is as follows: "When carriers undertake to convey persons by the powerful, but dangerous agency of steam, public policy and safety require, that they be held to the greatest possible care and diligence, and whether the consideration for such transportation

be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. * * Any relaxation of the stringent policy and principles of the law would be highly detrimental to public safety."

These principles were further upheld by the case of *The New World v. King* (1853) 16 How. (57 U. S.) 469, a case of a free passenger carried on a steamboat injured by the explosion of the boiler; here Justice CURTIS, after citing the language of Justice GRIER, *supra*, remarks, "We desire to be understood to reaffirm that doctrine, as resting, not only on public policy, but on sound principles of law."

The more recent cases also support this doctrine. In *Waterbury v. The New York Central & H. R. R.R. Co.* (1883), (Cir. Ct. N. D. N. Y.), 17 Fed. Repr. 671, Justice WALLACE says, "When the assent to his [the passenger's] riding free has been legally and properly given, the person carried is entitled to the same degree of care as if he had paid his fare."

The case of *Files v. Boston and Albany R.R. Co.* (1889), 149 Mass. 204, where the plaintiff was injured while riding on a freight train, further shows that the responsibility of a carrier of passengers does not depend upon any pecuniary compensation, Justice DEVENS saying, "if the defendant had permitted the plaintiff to acquire the rights of a passenger, it would not be important that he was not to pay any fare." The same doctrine has been upheld in Maryland: *State ex. rel. Abell v. The Western Maryland R.R. Co.* (1885), 63 Md. 433.

In Wisconsin, it has been held

that a carrier may, in cases of gratuitous contracts, exempt himself from liability other than gross negligence: *Anna's Adm'r etc.*, v. *The Milwaukee & Northern RR. Co.* (1886), 67 Wis. 46, thus following the rule laid down in the majority of the cases. To the same effect is the law in Indiana: *Thayer v. St. Louis, Alton & Terre Haute Ry. Co.* (1864), 22 Ind. 26; and of Illinois, *Illinois Central RR. Co. v. Read* (1865), 37 Ill. 484.

The Constitution of Nebraska of 1875, Art. II, provides—"Section 4. The liability of railroad corporations as common carriers shall never be limited;" under this Article, the Supreme Court of that State, in *Missouri Pacific RR. Co. v. Vanderventer*, decided (March 20, 1889), that the company could not limit its liability by a special contract.

A very strong opinion against the validity of such contracts was delivered in *G. C. & S. F. Ry. Co. v. McGown* (1886), 65 Texas 640 (also a conditional free pass case), by Associate Justice STAYTON, as follows: "Treating the pass as the evidence of a contract between the parties, and giving to it the most favorable construction for the appellant [the company], the question in the case broadly stated, is, can a public carrier of passengers so contract as to relieve itself from liability for an injury to a passenger from the negligence of the carrier or its servants? That there are many cases which hold that a public carrier of passengers may so limit its liability, cannot be questioned. * * We are of opinion that the distinction sought to be made in the New York and New Jersey cases * * has no solid foundation in reason or in public

policy, when considered with reference to the right of a corporation, pursuing the business of a common carrier, to limit, by contract, its liability to a passenger for injury resulting from the negligence of any class of its agents. * * The question whether a railroad company—a public carrier of passengers—can relieve itself from liability, even to a free passenger, for an injury which results from the negligence of any of its employes or agents of whatever grade, has not been decided in this State, but it arises in this case. It seems to us upon principle, that it must be held that such a carrier cannot relieve itself, by contract, from responsibility for injury that results from negligence, such as will fix liability upon the carrier under the general rules applicable to the ordinary relation of carrier and passenger. That the fact that the liability of the carrier does not depend on the fact that compensation for the passage is paid to the carrier, is well settled. * * The relation of passenger and carrier is created by contract, express or implied, but it does not follow from this that the extent of liability or responsibility of the carrier is, in any respect, dependent on a contract. In reference to matters indifferent to the public, parties may contract as they please, but not so in reference to matters in which the public has an interest. For the purpose of regulating such matters, rules have been established, by statute, or the common law, whereby certain duties have been attached to given relations and employments. These duties attach as matters of law, and without regard to the will or wish of the party engaged in the employment, or of the person who transacts business with

him, in the course thereof; and this is so, for the public good. Duties thus imposed, are not the subject of contract. They exist without it, and cannot be dispensed with by it. The violation of such a duty is a tort. The law declares that it is the duty of a public carrier of passengers to use the highest degree of care, to insure safety. Why was not this left to be settled by the contract of the carrier and passenger? Certainly for no other reason than that the employment itself was of such a nature as to make it a matter of public concern. None could be of greater public concern, at the present day, than these employments by which men, women and children are transported by millions, by agencies of a most dangerous character and with a speed heretofore unknown. The rule * * is demanded by the nature of the employment, and embraces a policy which no State, having a due regard for the safety and lives of its people, can abandon; for it discourages negligence, by holding the carrier to strict responsibility, and imposes upon him no responsibility which he does not voluntarily assume when he engages in such employment. It is simple, and discards all fine discriminations in regard to degrees of negligence, and grades of agents, in determining liability and right to recover actual damages."

The theory declared in this opinion fully sustains the doctrine set forth in the majority of the cases previously noticed in this annotation, and also in the dissenting opinions in the New York cases (*supra*, p 391), and would seem to be the better law.

In its opinion in the case of *Flinn v. The Philadelphia, Wilmington*

& *Baltimore R.R. Co.* (1866), 1 *Houst. (Del.)* 469, a case of a driver's pass with a condition attached, the Court expressed itself thus: "It was inconsistent with the relation in which they [the company] stood to him [the plaintiff] or would have stood to any similar passenger under like circumstances, and utterly at variance with the duty which the law, on the ground of public policy, as well as the conservator of the lives and the personal safety, as well as the property of individuals, imposes upon them, as well as upon other classes of common carriers of persons, to allow of such an exemption or limitation of their responsibilities, for the personal safety of their passengers, against injuries resulting from their own negligence, or the want of due care and diligence in carrying them."

Reference may with advantage, be made to the case of *The Grand Trunk Railway of Canada v. Stevens* (1878) 95 U. S. 655. It was a somewhat peculiar one and came as near being one of a gratuitous carriage upon condition as any could do without being actually so, the respondent, the owner of a patented car coupling while negotiating with the appellant for its adoption and use, at its request went to Montreal to see the superintendent of the company, the company giving him a free pass upon the back of which was indorsed a notice exempting the company from all risk of accident under any circumstances. In delivering the opinion of the Court, which was to the effect that the contract was for hire, and not purely gratuitous, inasmuch as the mutual interest of the parties was concerned, and that the company was therefore liable, Justice BRADLEY, says, "We do

not mean to imply, however, that we should have come to a different conclusion, had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked, with apparent confidence, 'May not men make their own contracts, or in other words, may not a man do what he likes with his own?' The question at first sight seems a simple one. But there is a question lying behind that: 'Can a man call that absolutely his own, which he holds as a great public trust, by the public grant, and for the public use as well as his own profit?' The business of a common carrier, in this country at least, is emphatically a branch of the public service."

In a very elaborate opinion in the case of *The Pennsylvania Railroad Co. v. Henderson* (1865), 51 Pa. 315, which was also a case of a drover's conditional pass, Mr. Justice READ reviewed the previous decisions upon the question, and commented upon the New York and New Jersey decisions treating the dissenting opinions in the former as the better law, although delivered by the minority. Speaking of the condition attached to the pass in the case then before him he remarks: "This endorsement relieves the company from all responsibility from any cause whatever, for any loss or injury to the person or property, however it may have been occasioned; and our doctrine settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence."

The decision in *Bissell v. The New York Central R.R. Co.* (1862),

25 N. Y. 442, another case of this class, supported the contract as valid. The opinion, however, was not that of an unanimous Court, for Chief Justice DENIO, and Justices WRIGHT and SUTHERLAND dissented therefrom.

Other cases of the drover's class might be mentioned, but as they would not throw further light upon the question of public policy, and as the Courts have drawn a distinction between such passes, and those issued to a purely gratuitous passenger, it is not proposed to examine them in this annotation, which has, as far as possible, been confined to cases of contracts with gratuitous passengers, as originally intended. If, however, the line has, in any way been departed from, it has only been for the purpose of elucidating the subject as fully as possible.

The Constitution of the State of Pennsylvania provides (Art. XVII, Section 8): "No railroad, railway, or other transportation company shall grant free passes, or passes at a discount, to any person, except officers or employes of the company." A similar clause is not to be found however in any of the other State Constitutions.

The remarks of Justice WRIGHT in *Smith Adm'r v. The New York Central R.R. Co.* (*supra*, page 396), must not be lost sight of. He contends that such contracts are against public policy; that the State is interested not only in the welfare, but in the safety, of its citizens; that the question affects the public and not merely the party who is being carried. He insists that the passenger has no right to absolve a railroad company to whom he commits his person, from the discharge of these duties imposed upon it for

the safety of man; that such contracts encourage negligence and fraud; take away the motive of self-interest on the part of such carrier, which is perhaps the only one adequate to secure the highest degree of caution and vigilance; and holds that a contract which has these tendencies is contrary to public policy even when no fare is paid.

The penal side of the question must not be forgotten, for where the defendant's acts are made penal by statute none of the conditions printed upon the back of the ticket can have the effect to relieve it from its liability for gross negligence and carelessness. The case of *Commonwealth v. Vermont and Massachusetts R.R. Co.* (1871), 108 Mass. 7, illustrates this principle. It was an action brought against the company, under a penal statute, to recover a fine for the use of the widow and children of the deceased, killed while a passenger on the defendant's road, through the negligence of the company, its servants or agents. The deceased was in the habit of traveling upon defendant's road, selling corn to the passengers in the trains, under a contract with the company. He had a season ticket upon which was endorsed a condition exempting the company from liability for personal injuries received by the passenger while traveling on such ticket. The

Court held that none of the conditions had the effect to relieve the defendants from liability.

In conclusion, the reader's attention is called to the remarks of Justice SWAYNE in *The Indianapolis and St. Louis R.R. Co. v. Horst* (1876), 93 U. S. 291, a case in which a drover was injured while obeying the conductor's instruction in getting from a caboose, in which he had been traveling, to the top of an adjoining car. He says, "The passenger has no authority upon either, [*i. e.* upon either a passenger or a freight train] except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The public have no choice but to use it. The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation in public policy. It is approved by experience, and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it."

The question of Statutory Liability for causing death will be found fully treated upon in *THE AMERICAN LAW REGISTER*, vol. xxviii, pages 385, 513, 577, to which the learned reader is referred.

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ABSTRACTS OF RECENT DECISIONS.

BANKS AND BANKING.

Forged checks on a bank, purporting to be signed by one of its principal depositors, and running through a period of five months before the forgery was discovered, were accepted and paid by the drawee bank to other banks, which had cashed the checks in good faith, after inquiry of the drawee bank as to the state of the depositor's account; under these circumstances the drawee bank must bear the loss and cannot recover from the other banks the amount paid on the forged checks. *Deposit Bank of Georgetown v. Fayette Nat. Bank*, Ct. App. Ky., March 8, 1890.

BILLS AND NOTES.

Indorser of a promissory note, payable to the maker's own order, is liable thereon, although the maker does not indorse it until after his indorsement has been made. *Central Nat. Bank v. Dreydoppel*, S. Ct. Pa., May 5, 1890.

CHATTEL MORTGAGES.

Accommodation indorser upon a promissory note may be protected in his liability by a chattel mortgage, and such mortgage at the note's maturity will inure to the benefit of the holder of the note. *Tompkins v. Crosby*, Ct. Ch. N. J., May 8, 1890.

COMMON CARRIERS.

Delivery to warehouseman by a carrier of goods transported by it, such warehouseman being independent of the carrier and giving notice himself to the consignees of the arrival of the goods, in accordance with a custom well known to the consignees and long acquiesced in by them, terminates the liability of the carrier, and it is not liable if the goods are subsequently destroyed by fire. *Black v. Ashley*, S. Ct. Mich., April 11, 1890.

Stipulation in bill of lading that an agreed valuation shall cover loss or damage from any cause whatever, does not relieve the carrier for liability for the actual value of the goods when their loss is caused by the carrier's negligence. *Pennsylvania R. R. Co. v. Weiller*, S. Ct. Pa., April 21, 1890.

CONSTITUTIONAL LAW.

Statute forbidding peddling does not violate the inherent and indefeasible right of "acquiring, possessing and protecting property" secured by constitutional provision to the State's citizens, nor is the application of such a statute to citizens of another State, employed by a manufacturing company located in that State, to sell small articles from house to house, an interference with interstate commerce. *Commonwealth v. Gardner*, S. Ct. Pa., March 17, 1890.

CONTRACTS.

Public policy does not forbid a contract not to teach the French or German language, nor aid nor advertise to teach them, or either of them, nor to be connected with any person or institution teaching them, within a designated State, for the period of a year after leaving the other party's employment, but where it plainly appears that the restriction is greater than the necessity, such contract is unreasonable and will not be enforced. *Herreshoff v. Boutineau*, S. Ct. R. I., April 14, 1890.

CORPORATIONS.

Degree of Doctor of Medicine cannot be conferred by an institution incorporated under a statute which provides that persons may associate together and have the powers of a corporation for the purpose of establishing and maintaining "literary and scientific institutions." *Towshend v. Gray*, S. Ct. Vt., April 5, 1890.

List of stockholders in a corporation cannot be copied by one of the stockholders, who desires to use such list for the purpose of inducing other stockholders to join him in a suit against the corporation and share the expenses, although the State Constitution requires a list of the stockholders to be kept for inspection at the office of the corporation. *Empire Passenger Ry. Co's Appeal*, S. Ct. Pa., April 21, 1890.

EVIDENCE.

Alteration of check, which is apparent upon its face and affects the amount of such check, imposes upon the holder the burden of explaining how such alteration was made, though both the drawer and payee of the check are dead. *Hess' Appeal*, S. Ct. Pa., March 31, 1890.

Deed more than thirty years old and coming from the proper custody, under which title has long been asserted, is admissible in evidence without the production of a power of attorney by whose authority, according to its recitals, it was executed. *O'Donnell v. Johns*, S. Ct. Tex., Feb. 28, 1890.

FIRE INSURANCE.

Arbitration clause in a fire policy, which provides that, in case of loss, the amount of "loss or damage" shall be ascertained by arbitration, and shall not be payable until so ascertained, and that such arbitration shall be a condition precedent to bringing suit, is reasonable and valid, and applies although there has been a total loss of the property insured. *Chippewa Lumber Co. v. Phoenix Ins. Co.*, S. Ct. Mich., April 11, 1890.

Condition of policy on a dwelling and its contents provided that such policy should be void if the house became "vacant or unoccupied;" when the tenant occupying the house removed, the agent who issued the policy verbally informed the insured that the insurance would be good for thirty days and that the house would be

considered as occupied from the fact that the insured's goods remained in it; within the thirty days the house was burned; notwithstanding a condition in the policy that the agent could not vary its terms by parol, the insurer was bound by the agent's declarations, which constituted not a waiver of the condition, but merely a construction of the words "vacant or unoccupied." *Hotchkiss v. Phoenix Ins. Co. of Brooklyn*, S. Ct. Wis., March 18, 1890.

JURISDICTION.

Suit by stockholder of national bank against its officers and directors, all of whom are residents of the same State with such stockholder, to compel collection of a note due the bank and payment to the bank by the directors of sums lost by reason of their alleged illegal conduct, is not within the jurisdiction of the Federal Courts. *Whittemore v. Amoskeag Nat. Bank*, S. Ct. U. S., March 31, 1890.

LANDLORD AND TENANT.

Furniture leased to a tenant and used by him on the demised premises, is subject to the landlord's right of distress for rent. *Myers v. Esery*, S. Ct. Pa., April 7, 1890.

LIFE INSURANCE.

Assignment to creditor of a life insurance policy gives him the right to retain from its proceeds only the amount of his debt, his advances to keep the policy in force and the expenses of its collection, with interest on such disbursements. *Lewy v. Gillard*, S. Ct. Tex., March 4, 1890.

Indebtedness of insured to the estate of his ward will not render the proceeds of life insurance, taken out while he was perfectly solvent, for the benefit of his wife and children, applicable to the payment of such debt, where it is provided by statute that life insurance made by a husband for the benefit of his wife and children, whether insolvent or not, is valid as against creditors, unless made with intent to defraud. *Hise v. Hartford Life Ins. Co.*, Ct. App. Ky., April 5, 1890.

Limitation in a policy providing that no suit shall be brought thereon after six months from the death of the insured, will not bar an action where the beneficiary and the company's superintendent have agreed on the amount to be paid, and the latter has promised to pay it as soon as the money should be received from the home office. *Metropolitan Life Ins. Co. v. Dempsey*, Ct. App. Md., April 18, 1890.

"*Their children*," when used in a policy made payable to the insured's wife and in the event of her death in his life-time, then to their children, mean the children common to both the insured and his wife. *Evans v. Opperman*, S. Ct. Tex., Feb. 25, 1890.

MASTER AND SERVANT.

Assault and battery, committed by a servant sent to take personal property from the possession of a person who claims to own it, the assault being made by the servant in the attempt to gain possession of such property, renders the master liable in damages, although he had instructed his servant not to assault any one and not to break the law. *McClung v. Dearborne*, S. Ct. Pa., April 28, 1890.

MECHANIC'S LIENS.

Sub-contractor is not entitled to a lien against a property which the principal contractor has agreed to build and deliver to the owner, free of all liens; the former is bound by the original contract and is presumed to have notice of its terms. *Schroeder v. Galland*, S. Ct. Pa., April 21, 1890.

NEGLECTENCE.

Mercantile agency, notwithstanding a contract exempting it from liability for loss "caused by the neglect or other act of any officer or agent of the company," is liable for a loss occasioned by an error in its published book, when such error arose in printing the book, and not in collecting information for it, since the printing of the book is the act of the company itself. *Crew v. The Bradstreet Co.*, S. Ct. Pa., April 7, 1890.

Statute of Maryland gives an action for the death of a person, caused by the wrongful act or neglect of another, to the surviving wife, husband, parent or child of the deceased, while the West Virginia Statute provides that such action shall be brought in the name of the personal representative; an administrator appointed in Maryland cannot sue in Maryland under the West Virginia Statute for the death of his intestate caused by negligence in West Virginia. *Ash v. Baltimore & Ohio RR. Co.*, Ct. App. Md., March 18, 1890.

PRIVILEGE.

Service of summons in a civil suit for breach of promise upon a defendant who has been brought from another State by requisition as a fugitive from justice, charged with the crime of seduction, and, after hearing, has been discharged from custody, but has not left the court room, is void, the defendant being entitled to a reasonable time and opportunity to return to the State whence he was taken, before he can be lawfully served with process. *Moleter v. Suined*, S. Ct. Wis., March 18, 1890.

JAMES C. SELLERS.

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THE LAW GOVERNING AN ORIGINAL PACKAGE.

In the December number (1889) of THE AMERICAN LAW REGISTER (volume 28, pages 733-747), the constructions put upon the Commerce Clause of the Constitution at different periods during the first Century of the existence of the Supreme Court were reviewed for the purpose of demonstrating the safety of our dual systems of government, under the various decisions which necessarily called for some particular limitation upon either the National or the State authority. The decision of the so-called Original Package Case, since the publication of that article, calls for a more extended review of the cases actually decided, and this, in their order of time, and with the simple object of setting forth the settled law especially governing the transmission of merchandise from State to State for the purpose of sale.

I.

The agencies established by the Articles of Confederation were not entitled to the dignified appellation of government: M. LEAN, J. License Cases (1847), 5 How. (46 U. S.) 587.

The Articles of Confederation, which were ratified by State after State, from 1777 to March 1st, 1781, when Maryland gave her ratification, provided—

ARTICLE II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States in Congress assembled.

The effect of this clause, and the care taken to avoid the same effect in the Constitution, were thus stated by Marshall :—

But there is no phrase in the instrument [the Constitution] which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments: (*McCulloch v. The State of Maryland et al.*, 4 Wheat. 17 U. S. 406.)

The breadth of this clause may, be understood from the sentiments of Justice BALDWIN, in his concurring opinion in the *Miln* case, *infra*.

In the Declaration of Rights in 1774, Congress expressly admitted the authority of such acts of Parliament "as were *bona fide* restrained to the regulation of external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subject in America, without their consent." But in admitting this right, they asserted the free and exclusive power of "legislation in their several provincial legislatures, in all cases of taxation and internal polity, subject only to the negative of their sovereign, as has been heretofore used and accustomed." Taxation was not the only fear of the colonies, as an incident or means of regulating external commerce; it was the practical consequences of making it a pretext of assuming the power of interfering with their "internal policy," changing their "internal police," "the regulation thereof," "of intermeddling with our provisions for the support of civil government, or the administration of justice." The States were equally afraid of intrusting their delegates in Congress with any powers which should be so extended by implication, or construction, of which the instructions of Rhode Island, in May, 1776, are a specimen: "Taking the greatest care to secure to this Colony, in the strongest and most perfect manner, its present form and all powers of government, so far as it relates to its internal police, and conduct of our own officers, civil and

religious." In consenting to a declaration of independence, the Convention of Pennsylvania added this proviso, that "the forming the government, and regulating the internal police of the colony, be always reserved to the people of the colony:" (Bald. Views, 182.)

Police Power.

The question of the police power of the States cannot be fully entered into here for want of space, but it is necessary to observe what is meant by this phrase. To a mind constituted like that of Chief Justice TANEY, the police power is nothing more or less than the sovereign power; (*License Cases*, 5 How. 46 U. S. 583.) This seems to have been the opinion of Justice MATTHEWS in *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 497, 498, when he held the Iowa Statute to be void because not an exercise of jurisdiction over persons and property within the State, but without; if the railroad company and liquors offered for transportation had been wholly within the State, then they would have been the subject not merely of laws for the benefit of health and morals, but also of certain arbitrary policies looking to local benefit alone; to all of these, the police power would extend. Chief Justice FULLER quoted these sentiments with approval in the opinion of the Court in the *Original Package Case*, thereby confirming a political terminology already introduced; whereby sovereignty is an attribute of the nation, while the police power expresses all the authority reserved by the Tenth Amendment of the Constitution to the States respectively as distinguished from the people.

Chief Justice WAITE, in *Munn v. Illinois* (1877), 94 U. S. 113, 125, applied this broad definition to the State regulation of grain elevator charges, which was sustained as an exercise of constitutional authority over the conduct of one citizen towards another, in the use of private property, for the public good. And, in *Stone v. Mississippi*, (1879) 11 Otto (101 U. S.) 814, the Chief Justice affirmed the application of this power to the suppression of a lottery claiming protection for its charter as a contract: the protection was denied, by confining it to property, as distinguished from governmental rights, and the explanation given, that—

Many attempts have been made in this Court and elsewhere, to define the police power, but never with entire success. * * * But the power of governing is a trust, committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances:" (11 Otto, 101 U. S., 818, 820.)

Justice HARLAN, in the Oleomargarine case of *Powell v. Pennsylvania* (1887), 127 U. S. 678, 685, sustained the State law, forbidding the manufacture of oleomargarine, on the ground that the legislative power to promote the general welfare was very great and the legislative discretion in the execution of that power was very large: and this, notwithstanding the dissenting opinion by Justice FIELD, pointed out that this particular law was really founded upon the competency of the legislature to prescribe what articles of food, out of many equally healthy, might not be sold: (Id. 689-90.) This Oleomargarine case expressly followed *Mugler v. Kansas* (1887), 123 U. S. 623, which in turn followed *Barbier v. Connolly*, of which the important sentence is quoted, at the bottom of this page.

Justice GRAY, in *Wurts v. Hoagland* (1884), 114 U. S. 606, thus sustained a drainage law, as a constitutional exercise of legislative power, without reference to the right of *Eminent Domain* or the power of suppressing a nuisance.

Justice FIELD, notwithstanding his views in the Oleomargarine and other cases (*infra* page 413), recognized this view in the San Francisco laundry case, when considering the effect of the Fourteenth Amendment to the Constitution of the United States upon a local ordinance—

But neither the Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity: *Barbier v. Connolly* (1884), 113 U. S. 27, 31.

In the language of Justice HARLAN, (*N. O. G. L. Co. v. La. L. & H. P. & M. Co.* (1885), 115 U. S. 250, 661), this defines the police power, in the broadest sense, to include all legislation and almost every function of civil government.

Sic utere tuo ut alienum non laedas.

Those who regard the police power as something not touched by the Constitution, distinguish between the ordinary powers of government and those especially relating to good morals and the public health. This distinction is largely used in most of the opinions in the *License Cases*, especially in those portions of these opinions which are quoted by Justice GRAY in his dissenting opinion in the *Original Package Case* (*infra*). How far there can be an agreement in holding this view of the police powers of the States, may appear by a quotation from the opinion of Justice FIELD, concurring with the majority of the Court in the *Bowman case* (*infra*)—

The reserved power of the States, in the regulation of their internal affairs, must be exercised consistently with the exercise of the powers delegated to the United States. If there be a conflict, the powers delegated must prevail, being so much authority taken from the States by the express sanction of their people; for the Constitution itself declares that laws made in pursuance of it, shall be the supreme law of the land. But those powers which authorize legislation touching the health, morals, good order and peace of their people, were not delegated, and are so essential to the existence and prosperity of the States, that it is not to be presumed that they will be encroached upon so as to impair their reasonable exercise: (125 U. S. 503)

The language of the same Justice, in his dissenting opinion in *Munn v. Illinois*, will make the meaning of the last sentence more distinct. There, he was speaking of the Fourteenth Amendment and usual State constitutional guarantees, that no person shall be deprived of his property without due process of law, and he distinguished the methods of exercising the power of the State over private property into three classes, the last being what is usually known as the police power—

The State may take his property for public uses, upon just compensation being made therefor.

It may take a portion of his property by way of taxation for the support of the government.

It may control the use and possession of his property so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as to not injure his neighbor—*Sic utere tuo ut alienum non laedas*—is the rule by which every member of society must possess and enjoy his property: and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits: (94 U. S. 145.)

Naturally, Justice FIELD also dissented in the Oleomargarine Butter case (*Powell v. Pennsylvania*, 1887, 127 U. S. 678); and while concurring with the majority of the Court in *Bowman v. Chicago & N. W. RR. Co.* (1887), 125 U. S. 465, 501, took care to add that the police powers could not be used to define an article of commerce.

This definition of the police power is agreement with the sentiments of Justice WOODBURY, in the *License Cases* (1847), 5 How. (46 U. S.) 627; Justice GRIER, *Id.*, 631; Justice MCLEAN, in the *Passenger Cases* (1849), 7 How. (48 U. S.) 283, 398, 400; Justice STRONG, in *Hannibal & St. J. RR. Co. v. Husen* (1877) 95 U. S. 465, 471; Justice MILLER, in *The Slaughter House Cases* (1873), 16 Wall. (83 U. S.) 36, and *Morgan's RR. & S. Co. v. La.* (1886), 118 U. S. 455, 464; and many other Judges in cases where there is no interstate commerce question involved.

The distinction between the two views of the police power is important in all cases where the right of Congress to regulate commercial intercourse, comes into collision with an assertion of State authority excused by being an exercise of the police power. Not that there can be any doubt of the supremacy of the Constitution and the constitutional laws of the United States: *infra*, page 425. But there is a professional and consequently a lay discontent with opinions sustaining the Commerce powers of the Union, when they are examined by the solitary touchstone of these police powers of the States.

This is probably due to the superficial thought that these powers are not among those delegated to the United States. From the position of TANEY and WAITE and FULLER, there is

no weakening of State sovereignty, as commonly understood by any decision favorable to commerce among the States: the National power was granted in 1789, though possibly not used until 1890, and the rules of sixty years ago are now enforced in much the same way they were when originally applied.

The General Welfare includes an intercourse of both persons and property.

The Articles of Confederation further provided, that—

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no impostion, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

This clause, in a much abbreviated form, is now the First Clause of the Second Section of the Fourth Article of the Constitution (*infra*); and, in the latter form, is alluded to in *Gibbons v. Ogden* (*infra*) as the equal rights clause. The connection of this clause with interstate commerce arises from its object, here avowed to be for the security and perpetuity, not of mutual friendship alone, but of that interested kind which arises from intercourse. This last word was much discussed until the decision in the *Passenger Cases* (*infra*) fixed its definition. At that point in this article, the definition will be examined.

The power to regulate foreign commerce by treaty, always belonged to the general government.

The Articles of Confederation further provide, that—

ARTICLE IX. The United States in Congress assembled, shall have the sole and exclusive right and power of * * * * entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the

legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever * * * *.

This clause was commented upon by Chief Justice MARSHALL, in *Brown v. Maryland*, at the very inception of that part of his opinion where he discussed the conflict between a tax upon an importer and the Commerce clause of the Constitution (Art. I. Sec. 8).

The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal government to enforce them, had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, a matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity: (12 Wheat. 25 U. S. 445-6.)

A legal definition of "Commerce" was soon called for in the case of *Gibbons v. Ogden (infra)*; to that place the consideration of this word, in its constitutional sense, may be deferred.

The effect of a treaty upon foreign commerce, was much discussed in the *Passenger Cases* (1849), 7 Howard (48 U. S.) 283, but no decision reached as the laws of Massachusetts and New York were declared to be in conflict with the commerce clauses of the Constitution, aside from any national law or treaty. The supremacy of a treaty is secured by the Sixth Article of the Constitution, but the language of the Constitution implies that the validity of a treaty is bounded only by the "authority of the United States," and so extensive a sub-

ject must be omitted here, for future consideration. (See 1 Story, Const. § 1841, and notes by Cooley.)

II.

The construction of the Constitution should be influenced, in cases of doubt, by the objects sought in the adoption of the instrument, and its declaration of supremacy within its own sphere.

As soon as drafted, and ever since, there has been a dispute over the method of interpreting the language of the Constitution. Some consideration must necessarily be given to this fundamental principle, and there is here gathered a statement of the views expressed or quoted by the jurists of the country with the Commerce Clause of the Constitution especially before them.

State Taxation of Commerce.

Commenting upon the power of taxation given by the Constitution, Hamilton argued—

An entire consolidation of the States into one complete National sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the Convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different: I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority: The Federalist, No. 32 (No. 31 of Dawson's ed.).

In connection with these palliating sentences of Hamilton, it is to be observed that the result of the principles of *McCullough v. The State of Maryland* (1819), 4 Wheat. (17 U. S.) Vol. XXXVIII.—27.

316, affirmed and applied to importations from both foreign and sister States in *Brown v. The State of Maryland (infra)*, subordinates the power of every State in respect to taxation, to the Constitution of the Union and the construction put upon it by the National Supreme Court. Similarly, there result from the principles of *Gibbons v. Ogden (infra)*, affirmed and applied in the *Passenger Cases (infra)*, the same subordination of the State taxing power, in respect to persons and the instruments of commerce. All of these principles are more fully considered a few pages later, under the appropriate sections of the Constitution.

A Strict Construction improper.

When Chief Justice MARSHALL came to read the opinion in *Gibbons v. Ogden, infra*, he found it worth while to begin with this preliminary remark, in relation to the Constitution,—

The instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized "To make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. * * * If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction: (9 Wheat. 22 U. S. 188.)

Three years later, when the Chief Justice came to decide *Brown v. Maryland*, he made another preliminary remark worthy of attention—

In performing the delicate and important duty of construing clauses in the Constitution of our country, which involve conflicting powers of the government of the Union, and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power: (12 Wheat. 25 U. S. 437.)

Previously when writing the opinion in *McCullough v. Maryland*, in 1819, the question of an implied power came under discussion, as there was no direct grant of power to Congress to incorporate a bank; the power was sustained and the rule thus declared:—

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional: (*McCulloch v. The State of Maryland et al.*, 4 Wheat. 17 U. S. 421.)

Justice JOHNSON, in his concurring opinion in *Gibbons v. Ogden*, gave another objection to the too prevalent strict construction rule—

In attempts to construe the Constitution, I have never found much benefit resulting from the inquiry, whether the whole, or any part of it, is to be construed strictly, or literally. The simple, classical, precise, yet comprehensive language in which it is couched, leaves, at most, but very little latitude for construction; and when its intent and meaning is discovered, nothing remains but to execute the will of those who made it, in the best manner to effect the purposes intended. The great and paramount purpose, was to unite this mass of wealth and power, for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but means. But the principal of those means, one so essential as to approach nearer the characteristics of an end, was the independence and harmony of the States, that they may the better subserve the purposes of cherishing and protecting the respective families of this great republic: (9 Wheat. 22 U. S. 223.)

Fourteen years later, Justice BALDWIN was called upon to decide the question of an implication from the constitutional power of the Supreme Court over controversies between two or more States. Justice BALDWIN's views were quite diverse from those of MARSHALL, (see under the *Miln Case*, *infra*), and yet he too admitted the necessity of recognizing implied powers:—

That some degree of implication must be given to words, is a proposition of universal adoption: implication is but another term for meaning

and intention apparent in the writing, on judicial inspection; "the evident consequence" (1 Bl. Com. 250), "or some necessary consequence resulting from the law," (Lal. Chan. in *Bp. Sodor v. Derby*, (1751,) 2 Ves. Sen. 357), or the words of an instrument, in the construction of which the words, the subject, the context, the intention of the person using them, are all to be taken into view. (MARSHALL, C. J., *McCulloch v. Maryland*, (1819), 4 Wheat. 17 U. S. 415; BALDWIN, J., *U. S. v. Arredondo et. al.*, (1832), 6 Peters, 31 U. S. 739, 741.) Such is the sense in which the common expression is used in the books, "express words or necessary implication," such as arise on the words taken in connection with other sources of construction; but not by conjecture, supposition, or mere reasoning on the meaning or intention of the writing * * * * In the construction of the Constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted (MARSHALL, C. J., in *Ogden v. Saunders*, (1827), 12 Wheat. 25 U. S. 354; *Cohens v. Virginia*, (1821), 6 Wheat. 19 U. S. 416; *Craig et. al. v. Missouri*, (1830,) 4 Peters, 29 U. S. 431, 432), to ascertain the old law, the mischief and the remedy: (*Rhode Island v. Mass.*, (1838), 12 Peters, 37 U. S. 723.)

III.

The regulation of foreign and interstate commerce is exclusively vested in Congress, and the States may not legislate upon any subject entering into such commerce, unless the regulation is of a particular subject which does not require a general or uniform system and Congress has not directed otherwise.

The Constitution provides, in Article One—

SECTION 8. The Congress shall have power * * * * * To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes; * * * * *

This section is devoted exclusively to defining the powers conferred upon Congress: MILLER, J., *Morgan's R.R. & S. Co. v. La.* (1886), 118 U. S. 445, 467. Its meaning is not expressed in obscure language, and the words being selected with no intention to conceal power, must be understood in their natural sense: MARSHALL, C. J., *Gibbons v. Ogden* (1824), 9 Wheat., (22 U. S.) 188; LAMAR, J., *Kidd v. Pearson* (1888), 128 U. S. 1, 20.

The word "Regulate" was made the ground of an argument in the case of *Gibbons v. Ogden*, where it was said that the right to pass from State to State was not conferred by the Constitution, but by a higher law which every civilized man acknowledges. From this, the inference was drawn that the Congress might

regulate the right but that the State might annihilate it. The Court assented to the former proposition, but denied the conclusion drawn as contrary to the more obvious conclusion that the power to exercise the license conferred by the regulation, must imply the continuance of the right which has been regulated by the license: (9 Wheat. 22 U. S. 211, 212.)

It will be observed that this early application of the heretical doctrine of nullification was made in a case arising in the State of New York and by an advocate for a monopoly.

It was repeated in the License Case of *Pierce et al. v. New Hampshire* (1847), 5 How. (46 U. S.) 504, 600, where the State Court appeared to Justice CATRON to have assumed that the State had the power to declare any article of commerce to be deleterious to good morals and the public health, and consequently removed from that lawful commerce which Congress could regulate. Of course, this could not be, and yet the reasonable solution of the difficulty appeared alike to Justice CATRON (*ubi supra*) and Justice GRAY dissenting (in the *Original Package Case*), to be the construction of KENT, that the State might legislate until Congress interfered. Such solution preserves the power of local self-government, dear alike to the believer in the doctrine of States' Rights and of a strong National government. This solution did not become the law, as the State of New York first, and afterwards Massachusetts, compelled the Court, in the *Passenger Cases*, 1849 (*infra*), to adopt a construction which would preserve the constitutional power of Congress and yet leave the subjects of pilotage, quarantine, and the like, under the control of the various States. Congress did not act, perhaps from the curious objections of the slaveholders to a construction of the word Commerce which would include Negroes, and some of the States showed the strongest disposition to place destructive restraints upon commerce. The principles of MARSHALL were therefore fully carried out by his successors of quite different political principles, and in such a line of cases as to fix the interpretation of the commerce clause of the Constitution in the manner expressed at the head of this section.

Upon the general subject of the extent of this constitutional power, Justice JOHNSON, in his concurring opinion in *Gibbons v.*

Ogden, alluded to the well known condition of commercial affairs prior to the adoption of the Constitution, and concluded that the grant was of the supreme and exclusive power of each State, without regard to mere verbal criticism. In his own language,—

The history of the times will, therefore, sustain the opinion that the grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of remedying those evils, could be only commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people, when the grant was made * * * * By common consent, those [State] laws dropped lifeless from their statute books, for want of the sustaining power, that had been relinquished to Congress: (9 Wheat. 22 U. S. 225-6.)

This construction of the word "Regulate" was approved by Justice BALDWIN in his concurring opinion in *The Cherokee Nation v. Georgia* (1831), 5 Peters (30 U. S.) 44; and was the basis of Chief Justice FULLER's opinion in the *Original Package Case*, *infra*. It is open, of course, to the uncertainty admitted by Justice McLEAN—

No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union and the municipal power of a State. Numerous cases have arisen, involving these powers, which have been decided, but a rule has necessarily been observed as applicable to the circumstances of each case and so must every case be adjudged: (*Passenger Cases*, 1849, 7 How. 48 U. S. 402.)

The same feeling of uncertainty was expressed by Chief Justice WAITE (*supra*, pages 411-2) as late as 1879, and now in the *Original Package Case*, the present Chief Justice admits that in the absence of congressional regulation, the line bounding the power of a State over merchandise and persons from another State or a foreign country, must be laboriously traced from point to point as cases are determined by the Supreme Court of the United States. Such is the course pursued in this article, and the resulting information is summed up at its close, just before the *Original Package Case* is printed.

There is no restraint upon Congress in choosing the means of regulating foreign and interstate commerce.

Congress has a general power, which has been the subject of much controversy:—

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof: (Art. I, § 8, last clause.)

When Chief Justice MARSHALL was discussing the arguments advanced against the powers of the Bank of the United States, he met that most relied upon, by a consideration of the word "necessary" in this and in the Tenth Section of the First Article of the Constitution:—

Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison, and is often connected with other words, which increase or diminish the impression the mind receives, the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses, and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view: (*McCulloch v. The State of Maryland et. al.* (1819), 4 Wheat. (17 U. S.) 414, 415.)

This was merely a more extended statement of the same thought, which the Chief Justice had expressed fourteen years earlier, in upholding the preference claimed by the United States, out of a bankrupt's estate—

In construing this clause, it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means,

and must be empowered to use any means which are, in fact, conducive to the exercise of a power granted by the Constitution: *Fisher v. Blight*, (1805) 2 Cranch (6 U. S.) 358, 396.

These sentiments, with those already printed on pages 418, 419, *supra*, were affirmed in a series of cases culminating in the *Legal Tender Case* (1883), 110 U. S. 421, where Justice FIELD alone dissented from the majority of the Court composed of WAITE, C. J., and MILLER, BRADLEY, HARLAN, WOODS, MATTHEWS, GRAY (who delivered the opinion) and BLATCHFORD, JJ.

Congress must deal equally with the commerce of different States.

The First Article of the Constitution also provides,—

SECTION 9. No tax or duty shall be laid on Articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

This section is devoted to restraints upon the power of Congress and the Executive: MILLER, J. *Morgan's RR. & S. Co. v. La* (1886), 118 U. S. 455, 467; its effect upon State regulations may be deferred until the consideration of the case of *Munn v. Illinois*, *infra*.

When Chief Justice Marshall was defining commerce to mean not merely traffic but also intercourse, including navigation, he found additional confirmation in his construction of this term, "commerce," from the preceding words of the Ninth Section,—

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

This method of construction was used in defining what commerce was interstate: *Gibbons v. Ogden*, *infra*.

Express restraints upon the States.

The First Article of the Constitution further provides,—

SECTION 10. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, * * * *.

This section is devoted to restraints upon the powers of the States: MILLER, J. *Morgan's RR. & S. Co. v. La.* (1886), 118 U. S. 455, 467; and the extent to which a State may require inspection, will be considered with the case of *Turner v. Maryland*, *infra*.

The police power of the States, must yield to the commercial power of the United States.

The provisions of a portion of the Sixth Article of the Constitution are also worthy of note here—

This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

When Chief Justice MARSHALL came to that point in his opinion in *Gibbons v. Ogden*, where he proposed to treat the question before the Court as one of collision between the National navigation laws and the State grant to Livingston and Fitch, he was met by the argument that these laws were, in fact, equal opposing powers. To this came the clear exposition—

But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy, not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are con-

trary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it: (9 Wheat. 22 U. S. 210-11.)

The foundation for these remarks had been securely laid five years previous, while discussing the effect of the powers of the National government upon State taxation, in the case of *McCullough v. The State of Maryland*, decided in 1819 and reported in 4 Wheat. (17 U. S.) 316.

It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution: (Id. 427.)

The words of the Constitution being given their obvious meaning, the police power of the States has been constantly restrained by the supremacy of the United States in those particulars, where power has been directly or impliedly conferred on the National government: SWAYNE, J., *N. W. Fert. Co. v. Hyde Park* (1878), 7 Otto (97 U. S.), 659, 663; FULLER, C. J., and GRAY, J., in the *Original Package Case*, *infra*, citing many cases.

Police powers are not delegated to the United States, and not prohibited to the States, and consequently are reserved to the States.

Article Tenth of the Amendments, was adopted with the others, by the concurrence of the requisite number of the States, December 15, 1791; it provides that—

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The word "expressly" is not contained in this Amendment and the explanation of its absence has already been given: *supra*, page 410.

As the police power belonged to the States before the adoption

of the Constitution, and was not taken away from them by that instrument, its existence has been constantly recognized by the Courts: HARLAN, J., *Patterson v. Ky.* (1878), 7 Otto (97 U. S.) 501, 503, and citations; FULLER, C. J., and GRAY, J., in the *Original Package Case*, *infra*.

Commenting upon this reservation of power, Chief Justice Parker, of New Hampshire, observed in one of the License Cases—

It is very clear that the power of regulating the internal trade, and matters of police of the several States, is not granted to the United States, nor prohibited to the States. As a general rule, it is undeniable that each State may manage affairs of that description as fully as it might do before the Government of the United States was formed, except in cases where there is an express prohibition in the Constitution; and if the right to pass laws which regard the prevention of crime, pauperism, and misery, and the promotion of the health and happiness of the citizens, by imposing restraints upon the sale, and upon the exclusive use of the means of intoxication (which has been supposed to be a very important branch of police), is taken away by the Constitution, it must be by some grant of power to the general government inconsistent with further legislation of that description by the several States. And if they are thus deprived of it by implication, it is lost entirely; for there is no grant of power in the Constitution which will enable the Government of the United States to exercise any such authority. There is no express or implied grant by which that government can regulate the internal trade of the States in relation to this, or any other article. It has never attempted any such thing: (13 N. H. 572-3.)

The power of Congress to recognize State laws, and to permit their operation, is considered later in these pages, under the recent Act of Congress relative to the liquor traffic.

Omitted Subjects.

The limited space at command for the examination of so important and extensive a subject, requires a somewhat close adherence to the subject announced in the title of this article; so that the omission is necessarily made of an examination into the legal effect of the embargo acts, tariff laws, the constitutional restraint in Art. 1, § 9, cl. 1, (further than it is alluded in the *Passenger Cases*, *infra*), and similar subjects.

IV.

Commerce is a unit comprehending every species of commercial intercourse, as well as traffic.

The Regulation of Commerce is effected by prescribing rules for carrying on commercial intercourse.

The power to regulate Commerce, extends into the jurisdiction of the States, until each instance of commercial intercourse with foreign nations and among the States has terminated.

The power of Congress to regulate commerce includes the control of navigation.

A coasting license under the laws of the United States, nullifies a State law requiring a State license for the use of steam to propel a vessel within a harbor of the State.

Gibbons v. Ogden (1824), 9 Wheat. (22 U. S.) 1, came up from the Court of Errors of New York, where a decree had been made in January, 1820 (17 Johns. N. Y. 488, 510), unanimously affirming the decretal order of Chancellor KENT, made October 6, 1819 (4 Johns. Chan. 150), whereby the State courts affirmed the validity of grants made by the legislature of New York to Livingston and Fulton, for the exclusive right to navigate steamboats in the waters of that State, for a limited period, with penalty of forfeiture of any steamboat not run under license from these grantees of the supposed powers of the State. Ogden claimed under Livingston and Fulton, and on the filing of his bill, Chancellor KENT, October 21, 1818, granted an injunction. This injunction was continued, on a motion to dissolve, made after Gibbons, the defendant, had filed his answer, in which he set up, (1) that he had a license to carry on the coasting trade under the laws of the United States, and (2) that he had a license under the representatives of Livingston and Fulton. The second ground of defense was futile, in view of its averments, and fell out of the case. The case therefore progressed through all the courts with a speed no greater than at present, upon the one point of the conflict between the grant by the State and the license for coasting trade by the National government. The constitutionality of the grants was not raised, as that had already been settled in the Court of Errors of New York, in *Livingston v. Van Ingen* (1812), 9 Johns. 507, where Chancellor Lansing had refused an injunction sustaining the grant, on the ground of the doubts which troubled him in construing the Commerce clause (Art. I. sec. 8) and the

Equal Rights clause (Art. IV. sec. 2), of the Constitution of the United States. On appeal, the refusal of the injunction was reversed, upon the two grounds, (1) that neither the powers of Congress over patents was exclusive of the power of the State to encourage the introduction of novelties by exclusive grants, nor (2) that the regulation of commerce had been interfered with. As the second point eventually reached the Supreme Court of the United States, the first need not be considered here. Upon the second point, YATES, J., expressed himself thus :—

It never could have been intended that the navigable waters within the territory of the respective States, should not be subject to this municipal regulation. Such a construction might, with equal propriety, be applied to turnpike roads, ferries, bridges and various other local objects, and thus, in the vortex of this construction, almost all subjects of legislation would be swallowed up, and it might eventually lead to the total prostration of internal improvements. To all municipal regulations, therefore, in relation to the navigable waters of the State, according to the true construction of the Constitution, to which the citizens of this State are subject, the citizens of other States, when within the State territory, are equally subjected: and until a discrimination is made, no constitutional barrier does exist. The Constitution of the United States intends that the same immunities and privileges shall be extended to all citizens equally, for the wise purpose of preventing local jealousies, which discriminations (always deemed odious) might otherwise produce. As this Constitution, then, according to my view, does not prevent the operation of those laws granting this exclusive privilege to the appellants, they are entitled to the full benefit of them: (9 Johnson 561.)

Kent was also one of the judges and delivered a separate opinion upon the constitutionality of the acts of the legislature of New York. Some extracts will be interesting when read in connection with his explanations in 1827, three years after the Supreme Court of the United States had reversed all these decisions :—

The law concerning the coasting trade was passed on the 18th of February, 1793; and it never occurred to any one during the whole period that the State laws were under consideration before the legislature, and in the council of revision, and in the courts of justice, from 1798 down to and including the judicial investigations in 1812, that the Coasting Act of 1793 was a regulation of commerce among the States, prohibitory of any such grant. Such latent powers were never thought of, nor imputed to it: (1 Comm. 435.)

Returning to the opinion delivered in 1812, these sentiments were expressed by KENT—

There is no obvious constitutional objection, or it would not so repeatedly have escaped the notice of the several branches of the [State] government, when these acts were under consideration. The act [passed] in the year 1798 was particularly calculated to awaken attention, as it was the first act that was passed upon the subject, after the adoption of the Federal Constitution, and it would naturally lead to a consideration of the power of a State to make such a grant. * * * There were members in that legislature, as well as in all the other departments of the [State] government, who had been deeply concerned in the study of the Constitution of the United States, and who were the masters of all the critical discussions which had attended the interesting progress of its adoption. Several of them had been members of the State convention, and this was particularly the case with the exalted character, who at that time was chief magistrate of the State (JOHN JAY; also Chief Justice of the United States from 1789 to 1794), and who was distinguished as well in the Council of Revision, as elsewhere, for the scrupulous care and profound attention with which he examined every question of a constitutional nature: (9 Johns. 573.)

We are not called upon to say affirmatively, what powers have been granted to the general government, or to what extent. These powers, whether express or implied, may be plenary and sovereign, in reference to the specified objects of them.

They may even be liberally construed in furtherance of the great and essential ends of the government. To this doctrine, I willingly accede. But the question here is, not what powers are granted to that government, but what powers are retained by this, and particularly, whether the States have absolutely parted with their original power of granting such an exclusive privilege as the one now before us. * * * * Our safe rule of construction, and of action, is this, that if any given power was originally vested in this State, if it has not been exclusively ceded to Congress, or if the exercise of it has not been prohibited to the States, we [the State government] may then go on in the exercise of this power until it comes practically in collision with the actual exercise of some congressional power. When that happens to be the case, the State authority will so far be controlled, but it will still be good in all those respects in which it does not absolutely contravene the provision of the paramount law. (Id. 574, 576).

Dismissing the equal rights clause of the Constitution (Art. IV. sec 2) as having nothing to do with the case, KENT proceeded to point out that the commerce clause (Art. I. sec. 8, cl. 3) was not, in terms, exclusive, and consequently suffered the States to exercise their sovereignty over internal commerce by land and water, while Congress regulated external commerce. While the exact limits of the power of Congress might be difficult to define, it seemed an inadmissible proposition that the exclusive grant in question had been placed beyond the power of the State, because Congress might enact a

conflicting law. As shown by the citation from his Commentaries, neither KENT nor any other lawyer or judge had thought at that time of the existing Act of 1793. And this is readily understood by another quotation from the same opinion:—

Congress, indeed, has not any direct jurisdiction over our interior commerce, or waters. [The] Hudson river is the property of the people of this State, and the legislature have the same jurisdiction over it that they have over the land, or over any of our public highways, or over the waters of any of our rivers or lakes. They may, in their sound discretion, regulate and control, enlarge or abridge, the use of its waters, and they are in the habitual exercise of that sovereign right. If the Constitution had given to Congress exclusive jurisdiction over our navigable waters, then the argument of the respondents would have applied; but the people never did, nor ever intended, to grant such a power; and Congress have concurrent jurisdiction over the navigable waters no further than may be incidental and requisite to the due regulation of commerce between the States, and with foreign nations: (9 Johns. N. Y. 579.)

Returning to the case as finally presented to KENT, after he became Chancellor, he dismissed the newly supposed conflict, between the legislature thus sustained and the National coasting license law, with the terse remark, that—

If the State laws were not absolutely null and void from the beginning, they require a greater power than a simple Coasting license, to disarm them: (4 Johns. Chan. 156, 158, 159.)

Before the injunction order in the last case had been affirmed on appeal, Gibbons undertook to set up a circuitous route between Elizabeth and New York, by way of the Quarantine; with the result of the defendant and his steamboat captain, *Vanderbilt*, almost suffering the penalties of an attachment.

It would seem that the appeal to the Court of Errors was merely a formal step towards the Supreme Court of the United States (17 Johns. N. Y. 505) though the right of the legislature to make such a grant was again questioned and briefly affirmed by the Court. The argument based upon the coasting license was briefly considered and also denied, PLATT, J., saying—

The term "license" seems not to be used in the sense imputed to it by the counsel for the appellant; that is, a permit to trade; or as giving a right of transit. Because it is perfectly clear, that such a vessel, coasting from one State to another, would have exactly the same right to trade, and the same right of transit, whether she had a coasting license or not.

She does not, therefore, derive her right from the license ; the only effect of which is, to determine her national character and the rate of duties which she is to pay. * * * Whether Congress has the power to authorize the coasting trade to be carried on in vessels propelled by steam, so as to give a paramount right in opposition to the special license given by this State, is a question not yet presented to us. No such act of Congress yet exists, and it will be time enough to discuss that question when it arises : (17 Johns. 509.)

When Mr. Webster came to argue the case in the Supreme Court of the United States, he made a strong point of the conflict which had already arisen ; in retaliation to the laws of New York, Connecticut had forbidden any steam vessel having a license under the laws of New York from entering her waters, while New Jersey gave to any one of her citizens who should be restrained by the laws of New York, an action for damages and treble costs against the party who invoked the law of New York. This was the serious danger before the Court, to be averted by reversing, or perpetuated by affirming, the injunction ordered by Chancellor Kent.

Again, he urged that the present government came into being only or chiefly at least, because of the necessity for a steady and uniform commercial system. This part of his argument was adorned with many historical references ; and concluded by urging that the power of Congress was exclusive, so that what was not legislated upon, was thus regulated in the negative.

This is now the view of the Supreme Court (1 Kent Comm. *438). In those days MARSHALL preferred to decide no more than the cases before the Court called for, although the principles upon which his decisions proceeded furnished the foundation for the affirmance of Webster's contention long after both the Chief Justice and the great Lawyer had passed away.

On the other side, the counsel contended, as a result of many authorities, that the power contained in the Commerce clause, was at best, a concurrent one ; the argument following the lines already indicated in the opinions of the New York Courts.

The Supreme Court of the United States was at this time (1824) composed of Chief Justice MARSHALL, who wrote the opinion of the Court, and Justices WASHINGTON, TODD, DUVALL, STORY, and JOHNSON (who also wrote a concurring opinion).

The Chief Justice began his opinion with words worthy of remembrance :—

The State of New York maintains the constitutionality of these laws ; and their legislature, their Council of Revision, and their judges, have repeatedly concurred in this opinion. It is supported by great names—by names which have all the titles to consideration which virtue, intelligence and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority ; but it is the province of this Court, while it respects, not to bow to it implicitly ; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.

Coming then to the question before the Court, the Chief Justice first laid down that the “Commerce,” which Congress had power to regulate, was a unit, comprehending every species of commercial intercourse.

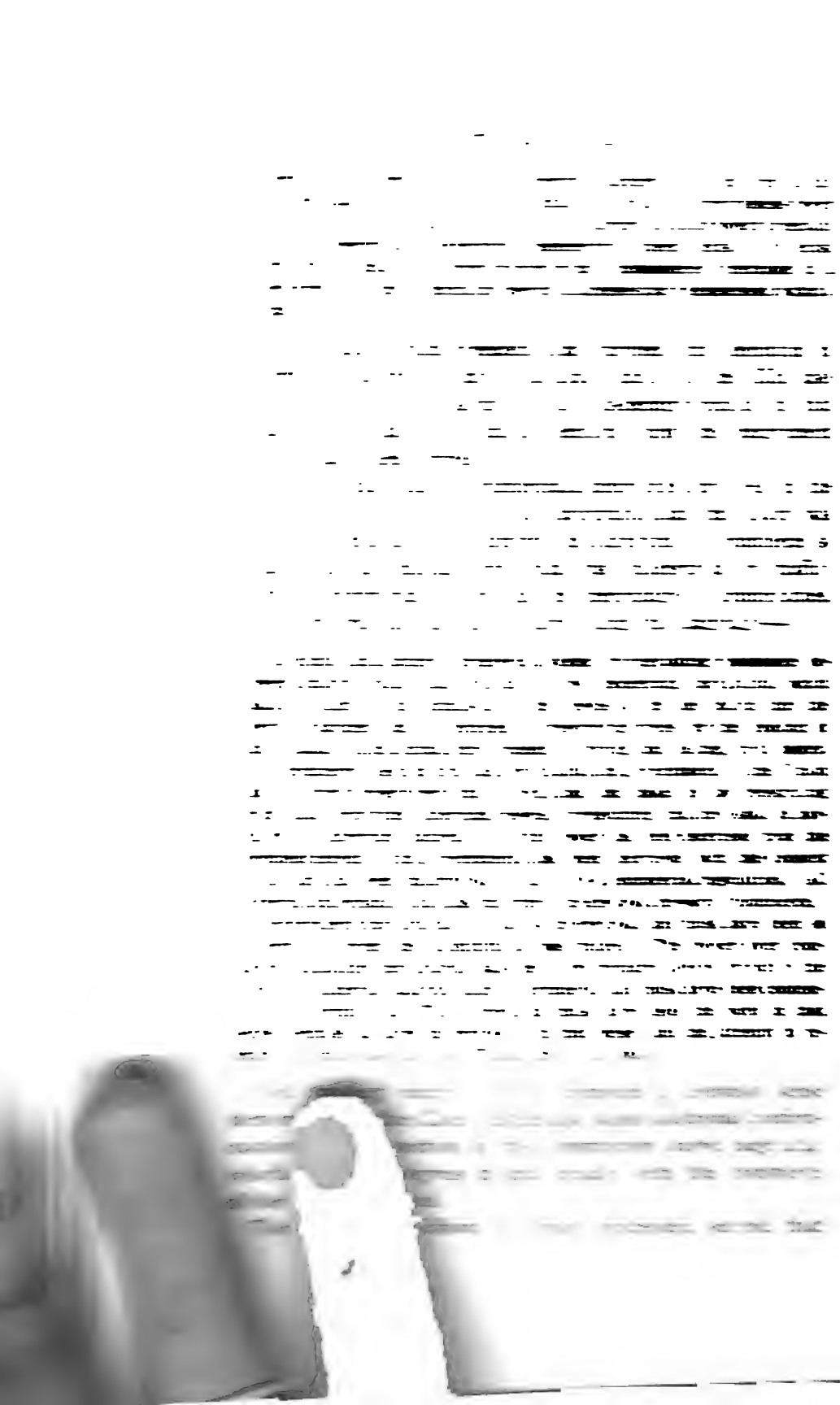
Justice JOHNSON wrote a separate opinion under the impression that his entire approbation of the judgment was founded on materially different views ; yet his definition was substantially the same, and worthy of repetition as approaching the subject from the same direction as taken by TANEY and the other dissenting Justices in the *Passenger Cases*, *infra*.

Commerce, in its simplest signification, means an exchange of goods : but in the advancement of society, labor, transportation, intelligence, care, and various mediums, of exchange, become commodities, and enter into commerce ; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Ship-building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects, would not possess the power to regulate commerce : JOHN-SON, J. *Gibbons v. Ogden* (1824), 9 Wheat, (22 U. S.) 229-30.

The definition of “Commerce” contained in MARSHALL'S opinion, has been often referred to ; thus STORY, dissenting in the *Miln Case* (11 Peters, 36 U. S. 154-5), cites these sentences :—

Commerce undoubtedly is traffic ; but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse : (9 Wheat, 22 U. S. 159.)

No sort of trade can be carried on between this country and any other, to which this power does not extend. * * * But, in regulating com-



the force of the word "Among," meaning intermingled with, was such that it could not stop at State lines, though not comprehending completely internal commerce of a single State, and this as—

The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself: (Id. 195.)

This distinction between the powers of the State and of the Nation, drew from Justice BALDWIN, in his opinion in the *Miln* case, the thought that nothing could be in more perfect conformity with the spirit and words of the Constitution: (Bald. Views, 188-9.) So also THOMPSON, J., dissenting in *Brown v. Maryland* (1827), 12 Wheat. (25 U. S.) 452.

The Chief Justice proceeded to the case in hand—

What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States: (Id. 196.)

Turning again to the principles decided by this great case, a consequence ensued from those already noticed, that, third, the power was one for regulation, without limit other than the Constitution prescribes; fourth, that the question of the power of a State to legislate in the absence of any Congressional action, was not decided, as Congress had already acted in pass-

merce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. * * * If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State: (Id. 193, 195.)

The Chief Justice repeated and affirmed this definition in *Brown v. Maryland*, and would have done so in the *Miln* case (as Justice STORY asserts in his dissenting opinion in that case), if he had lived until a decision upon the reargument could have been agreed to.

The special kind of commercial intercourse involved in the case of *Gibbons v. Ogden*, was navigation, and the Court was urged to exclude it, by limiting the definition of commerce so that it should include only what was understood by traffic; that is, buying and selling and the interchange of commodities. This was refused, the Chief Justice using this language—

The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of another, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late: (9 Wheat. 22 U. S. 190.)

Not trusting entirely to so complete a common sense demonstration, the Chief Justice also found additional confirmation in that section of the Constitution (*supra*, page 424) which requires Congress to deal equally with the commerce of the different States.

The opinion in *Gibbons v. Ogden*, proceeded, second, that

the force of the word "Among," meaning intermingled with, was such that it could not stop at State lines, though not comprehending completely internal commerce of a single State, and this as—

The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself: (Id. 195.)

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Turning again to the principles decided by this great case, a consequence ensued from those already noticed, that, third, the power was one for regulation, without limit other than the Constitution prescribes; fourth, that the question of the power of a State to legislate in the absence of any Congressional action, was not decided, as Congress had already acted in pass-

ing the navigation laws, and this remained for further consideration ; fifth, that the important question really was whether Congress and the States could regulate interstate commerce at the same time.

Noticing and approving Mr. Webster's argument for the exclusive power of Congress, the Chief Justice yet did not go so far as to rest the opinion of the Court upon that ground, but rather upon the practical side of the whole case, namely, the conflict between the two laws.

Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power " to regulate commerce with foreign nations and among the several States," or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress ; the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous : (p. 210.)

After an examination of the license given to a coaster, the Chief Justice had little difficulty in deciding that the license really did what it purported to do; that is, give permission to carry on a coasting trade ; and this without regard to the motive power of the vessel. Hence the State laws which inhibited the use of steam as a means of propulsion, came into direct collision with both the general coasting license and that granted to steamboats, and was void. The injunction was dissolved and the State Court directed to dismiss the bill filed for relief.

In eliminating those elements of the opinion which do not necessarily support the judgment entered, there is no intention to slight the points which occupy fully one-third of the opinion, and which were discussed as affording light from the context of the Constitution. In these pages they are taken up in connection with their appropriate cases, and it is merely necessary to anticipate here the statement of their natural result, that the power of Congress to refrain, as well as to act, is exclusive of any State action. Justice JOHNSON dissented solely because the judgment of the Court was not placed upon this larger ground, so that there is here shown the curious, though satisfactory result of a dissenting opinion becoming the law of the land without overruling the principles of the judgment actually entered.

Affirming this position as well as the similar sentiments of Justice GRIER in the *Passenger Cases*, (1849) 7 How. (48 U. S.) 283, 462, Justice BRADLEY, in *Walling v. Michigan* (1886), 116 U. S. 446, 456, called attention to the modifications subsequently established in *Cooley v. Port Wardens*, *infra*, and other decisions, and pointed out that the complete doctrine, as stated above on page 420, was well summarized by Justice FIELD, in *Mobile v. Kimball*, *infra*.

The effect of the license was the actual point decided: Per BARBOUR, J., *The Mayor, etc., v. Miln* (1837), 11 Peters (36 U. S.) 134; CATRON, J., *License Cases* (1847), 5 How. (46 U. S.) 504, 602; GRAY, J., dissenting in the *Original Package Case*, *infra*: that is, that the grant of power in the Constitution, accompanied by Congressional legislation under it, operated as an inhibition upon the State as respects the subject legislated upon: FIELD, J., *Mobile Co. v. Kimball* (1880), 102 U. S., 691, 699; *Gloucester Ferry Co. v. Pa.* (1885), 114 Id., 196, 211.

All Judges agree in considering this a great and leading case on the subject of foreign and interstate commerce but not alone from the point decided. The principles, and even the *dicta* of the great Chief Justice have become parts of the constitutional principles of the country, quite as much as the written words of the Constitution itself; and in this aspect, the objections of advocates of the fullest local power possible, are worthy of more consideration than the approbation of men of like mind with MARSHALL and his associate Justices. What errors have been successfully pointed out?

Reversing the course of time, and taking the dissenting opinion in the *Original Package Case* first, Justice GRAY there points out the restraint put upon the principles of this case by MARSHALL himself in *Willson v. Black Bird Creek Marsh Co.*, *infra*; similarly Justice CATRON, *License Cases* (1847), 5 How. (46 U. S.) 504, 605; Chief Justice TANEY, Id. 583, and dissenting in *Pa. v. Wheeling Bridge Co.* (1851), 13 How. (54 U. S.) 518, 586-7.

The Granger cases (1877), 4 Otto (94 U. S.) 155, 183, do not notice *Gibbons v. Ogden*, and cannot be considered as affecting its principles; but the general subject of rates even for

interstate transportation forms so large a division of the law and one so separable that it is omitted here for want of space.

It has been supposed that *Gibbons v. Ogden* was distinguished in *Morgan v. Parham* (1872), 16 Wall. (83 U. S.) 471, 475, but the same fundamental principle was applied in each case, and the only countenance to such an idea arises from the difference in the facts; the great case denying that interstate commerce could be compelled to obtain a State license, and the later equally denying the right of a State to tax a coaster away from her home port.

So far as *The Genesee Chief* (1857), 12 How. (53 U. S.) 452, established the admiralty jurisdiction of the United States Courts upon the navigability of the water, and not the commerce borne upon the water, there is no conflict with *Gibbons v. Ogden*, for the cases relate to entirely distinct matters.

Chief Justice TANEY and Justice CATRON, in the *License Cases*, *infra*, attempted to limit the power of Congress, so that it should not prevent State action, by an exclusive construction, the former asserting (5 How. 581), that the doctrine of the exclusive power of Congress was not seriously put forward until after the decision in *Gibbons v. Ogden*. So far as this attempt entered into the law declared in the *License Cases*, it will appear in the review of those cases, to have failed long before Chief Justice FULLER came to write the opinion of the Court in the *Original Package Case*.

The Miln case, *infra*, was a serious attempt to undermine the authority of *Gibbons v. Ogden*, and the disagreement amongst the Justices is not nearly so apparent in the report, as in the opinions of Justice WAYNE and Chief Justice TANEY in the *Passenger Cases*, *infra*. It is unnecessary to anticipate further than that the attempt resulted in the principles first positively formulated in *Coolcy v. Port Wardens*, *infra*, and now affirmed in the early part of the opinion in the *Original Package Case*, without any dissent; namely, that the power to regulate commerce among the States, is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs.

V.

Congress has exclusive power over the importation of foreign merchandise, and no State can require the payment of a tax, or license, before the sale by the importer, in the original package.

Foreign goods are imported by merchants for sale and their sales cannot be restricted further than their importations may be.

Imported merchandise, upon which the duties have been paid, is not subject to State taxation while in the possession of the importer and in the original packages, though offered for sale.

When an original package has been used or exchanged by breaking up for use or retail sale, and also when it has been sold by the importer in its original condition, it loses its distinctive character of an import and becomes subject to the powers of the State.

A tax upon the dealer is, in effect, a tax upon the goods themselves.

Brown et al. v. The State of Maryland (1827), 12 Wheat. (25 U. S.) 419, came up from the Court of Appeals of Maryland, where a judgment of the City Court of Baltimore, upon a demurrer to an indictment, had been affirmed, and the present plaintiffs in error condemned for not taking out a license as importers of foreign articles. They denied that the State could require such a license as the right to collect fifty dollars was a right which would authorize any sum as the license fee; that is, the power to lay such a tax was a power to destroy or prohibit, which had been declared outside of the present powers of the States in *McCulloch v. Maryland* (1819), 4 Wheat. (17 U. S.) 316.

The indictment had been founded upon an Act of the legislature of Maryland, passed in 1821, entitled—

An Act supplementary to the Act laying Duties on Licenses to Retailers of Dry Goods, and for other purposes.

SECTION 2. And be it enacted, that all importers of foreign articles or commodities of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whisky and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale, or package, hogshead, barrel or tierce, shall, before they are authorized to sell, take out a

license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement.

Under this Act, Chief Justice Marshall considered the question for solution was a single one with two aspects arising from two separate clauses of the Constitution, the Eighth and Tenth Sections of the First Article.

The cause depends entirely on the question, whether the legislature of a State can constitutionally require an importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported: (12 Wheat. 25 U. S. 436.)

That this was the precise point for decision was observed by Justice BARBOUR in delivering the opinion of the Court in *The Mayor, etc., v. Miln* (1837), 11 Peters (36 U. S.) 134; and by Chief Justice TANEY in the *License Cases* (1847), 5 How. (46 U. S.) 575, where he gave his adhesion to the doctrine denying such power to the State. He had been counsel for the State of Maryland in the Brown case, and he now thought the rule was a safe and just one, and most in harmony with the obvious intention of the Constitution.

Attention is called to this statement of the point decided, because there have been those who have considered this case to have been overruled by *Woodruff v. Parham* (1868), *infra*, where a tax upon all auction sales in the city of Mobile was sustained although some of the goods sold were from another State. The tax was sustained because there was no attempt to discriminate; it was imposed upon all sales and all persons making auction sales.

Under the Tenth Section of the First Article of the Constitution (*ante*, page 425), the Chief Justice coincided with the argument urged against the State—

Whether the prohibition to "lay imports, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them, which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer, the instant it was landed, as

by a power to tax it while entering port. There is no difference between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend upon the degree to which it may be exercised: (12 Wheat. 25 U. S. 439.)

This position did not command entire assent, though it was strong enough to induce the Supreme Court of New Hampshire to avoid it with the remark—

If the sale be prohibited, it may, notwithstanding, be introduced for use by the person importing, for export to another country, or for the purpose of being sent to another State and sold there, if a sale there be lawful: PARKER, C. J., *Pierce v. The State* (1843), 17 N. H. 586.

Of course, the law is now declared otherwise, in conformity with the sentiments of MARSHALL. See the decisions and citations in the opinion in *The Original Package Case*, *infra*.

Coming nearer to the precise case before the Court, it was argued that the tax demanded was upon the person, and not on the traffic. To this MARSHALL answered—

It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution: (Id. 444.)

In the other aspect of the case, under the Eighth Section of the Commerce clause of the First Article of the Constitution, there was an affirmance of the general principle laid down in

Gibbons v. Ogden (*supra*, page 432), where the extent of the power to regulate commerce among the several States, was declared to be without limitations other than those placed upon it by the Constitution. In the language of MARSHALL—

The power is co-extensive with the subject upon which it acts and cannot be stopped at the external boundary of the State, but must enter its interior * * * * * If this power reaches the interior of the State, and, may there be exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic * * * * Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as the importation itself. It must be considered a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell * * * * The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised, does not enter into the enquiry concerning its existence * * * * Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and the principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation: (12 Wheat. 25 U. S. 446-8.)

In this case, the rule in *Gibbons v. Ogden*, *ante*, page 426, received a necessary limitation, to prevent the abridgment of the power of taxation by the State—

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure, that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition: (12 Wheat. 25 U. S. 441.)

Realizing that this prohibition upon State taxation might be so construed as to deprive the State of its rightful powers, the language already quoted on page 440 *supra*, was followed by a definition which embraced the now well-known term used as a part of the title of these pages.

The power [of the State to tax] and the [Constitutional] restriction upon it, though quite distinguishable when they do not approach each other, may yet, like intervening colors between black and white, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State, but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution : (Id. 441-2.)

The precise case here supposed arose in California (*Low v. Austin*, 1872, 13 Wall. 80 U. S. 29), where an attempt to assess imported wines for local taxation was sustained by the State Supreme Court, but that judgment was reversed by the Supreme Court of the United States, Justice FIELD delivering the opinion. The duty had been paid on these wines, and the importer then stored them in the original packages awaiting a sale. The California Judges (TEMPLE, WALLACE, CROCKETT and SPRAGUE), thought this case did not rest upon the same principle as *Brown v. Maryland*,—

In this case, no tax is levied upon imports ; as such, they are not subjected to any burden as a class, and we did not understand the case of *Brown v. Maryland* as going to the extent of establishing that an *ad valorem* tax by the State, upon the property of its citizens, would be in conflict with this provision, even though a portion of such values were invested in imported goods still in the original packages and unsold. We see no reason why imported goods exposed in the store of a merchant for sale, do not constitute a portion of the wealth of the State, as much as domestic goods similarly situated. A tax which is imposed upon all the property of the State cannot in any sense be considered a tax upon commerce. It has no tendency to discourage importations. * * The tax prohibited must be a tax upon the character of the goods as importations, rather than upon the goods themselves as property.

The Attorney General of the State illustrated the argument that the State could tax, by asserting that this wine was placed where thieves might break through and steal, but for the local police force.

But the obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of MARSHALL

and TANEY, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer, or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition : FIELD, J., *Low v. Austin* (1872), 13 Wall. (80 U. S.) 29, 34.

This idea seems to have had some local prevalence, as it is combatted, though without reference to this denial, by DEADY, D. J., in *U. S. v. Bridelman* (1881), U. S. Dist. Ct., Dist. Ore., 7 Fed. Repr. 894, 901.

Afterwards, the case of an export arose by an attempt to tax logs purchased for export and at the place of export, waiting shipment to a foreign country. The tax was declared invalid, on the authority of *Brown v. Maryland* and *Low v. Austin*, by WOODS, Circ. J., *Clarke & Co. v. Clarke* (1877), U. S. Circ. Ct., S. Dist. Ga., 3 Woods 408.

The same judges concurred in *Brown v. Maryland* as in *Gibbons v. Ogden*, page 432, but Justice THOMPSON dissented, on the ground that nothing more was required by the Maryland law than that retail and wholesale dealers in foreign merchandise must take out a license for authority to sell; that this license in the case of retail dealers was thought to be no violation of the Constitution; that the wholesale dealer was such in the internal commerce of the State only; that he had been indicted for selling without a license and not for importing; and that there would be no doubt a violation of the Constitution if the State law had required a license to import. The Court was thus unanimous on the subject of importation and the great majority thought importation included the right to sell in the original package. The dissenting judge thought that the imports were not even protected by stopping at the line of the original package, as the moment it was broken, the State laws would apply and effectually serve to restrain imports; not being willing to go to that extreme, Justice THOMPSON dissented.

The Miln case (*infra*) necessarily involved the principles of this case, when it raised the question of the correctness of the principles of *Gibbons v. Ogden*; it is not necessary to anticipate, as the final result has been a complete affirmance.

VI.

State laws affecting commerce are valid in the absence of Congressional legislation, and in the case of a subject not requiring a general regulation.

Such a subject is a dam or bridge interfering with commerce in a stream wholly within a State though flowing into an interstate body of water.

Such laws are the exercise of the reserved police powers of the State.

The case of *Thompson Wilson, et al., v. The Black Bird Creek Marsh Company* (1829), 2 Peters (27 U. S.) 245, arose from the erection of a dam across a small salt water creek in the State of Delaware, under the authority of the State law passed in February 1822. The owners of a sloop called the *Sally*, broke down the dam which had been erected, and defended their action under the Commerce clause of the Constitution. This was denied by Chief Justice MARSHALL in delivering the opinion, on the ground that Congress had not acted, and in the absence of such action, the neighboring meadows might be kept dry and the health of the community improved by such schemes, even though the tide had flowed above where the dam was erected; the language of the opinion on this point was:

If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over these small, navigable creeks into which the tide flows and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such act, would be void. The repugnancy of the law of Delaware to the Constitution, is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question: (2 Peters, 27 U. S. 252.)

This case was distinctly affirmed in the Chestnut Street Bridge Case, (*Gilman v. Phila.* 1866, 3 Wall. 70 U. S. 713, 727-9) on an opinion by Justice SWAYNE, with the concurrence of Justice CHASE, and Justices GRIER, NELSON, MILLER and FIELD, the dissent being by Justices CLIFFORD, WAYNE and DAVID DAVIS; and again affirmed in *Pound*

v. *Turck* (1878), 5 Otto (95 U. S.) 459, in an opinion by Justice MILLER, with the concurrence of Chief Justice WAITE and Justices STRONG, HUNT, SWAYNE, FIELD, BRADLEY and HARLAN, Justice CLIFFORD also concurring, though still adhering to the principles of his dissenting opinion in *Gilman v. Phila.* It is used by Justice STRONG, in *Transportation Co. v. Chicago* (1879), 99 U. S. 635, 643, with the assent of all the last mentioned Justices, except HUNT (who was absent); by Justice FIELD, in *Cardwell v. Bridge Co.* (1884), 113 U. S. 205, 209, with the assent of Justices MILLER, BRADLEY, HARLAN, WOODS, MATTHEWS, GRAY and BLATCHFORD, Chief Justice WAITE being absent; and by Justices GRAY, HARLAN and BREWER, in their dissent in the *Original Package Case*, *infra*. It is therefore important to observe that this quotation from MARSHALL's opinion has been supposed to demonstrate that he did not hold to the exclusive view of the power of Congress which has subsequently been deduced from his language in the preceding cases. If such inference should be correct, then the Chief Justice should be classed with KENT and those who hold that the State may legislate until Congress acts. See pages 421, 430, 431, *supra*.

This understanding of MARSHALL's views was held by Chief Justice TANEY and Justices WOODBURY and CATRON, in the *License Cases*, 5 How. (46 U. S.) 583, 605, 625, although the latter recognized the conflicting statements of two contemporaneous Justices, THOMPSON and STORY, in the *M'n Case*, *infra*. TANEY repeated this sentiment in his dissent in the *Wheeling Bridge Case*, 13 How. (54 U. S.) 518, 585.

Justice DANIEL was on the bench when the *License Cases* were decided, but made no allusion to this case until the *Passenger Cases* came before the court, when he, too, joined in holding that—

The case of *Wilson v. The Blackbird Creek Marsh Company* affirms, in language too explicit for misapprehension, that the States may, by their legislation, create what may be obstructions of the means of commercial intercourse, subject to the controlling and paramount authority of Congress :'' (7 How. 48 U. S. 500.)

And similarly, when dissenting in the *Wheeling Bridge Case*, 13 How. (54 U. S.) 518, 599. And the dissent of Chief Jus-

tice WAITE and Justices HARLAN and GRAY, in *Bowman v. Chicago & N. W. RR. Co.* (1888), 125 U. S. 521-2. Naturally, therefore, the survivors (GRAY and HARLAN) dissent in the *Original Package Case*, *infra*, where their views are stated at length. Still, Chief Justice WAITE, eleven years previous, had explained that—

There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it: *Hall v. De Cuir* (1877), 5 Otto (95 U. S.) 485, 488.

Chief Justice WAITE also argued with Justice BRADLEY (one of the majority of the Court in the *Original Package Case*, *infra*), and with Justice GRAY in dissenting from the opinion of the Court in *Wabash, St. L. & P. RR. Co. v. Illinois* (1886), 118 U. S. 557, where the State was denied the power to regulate interstate freight and passenger rates.

At the turning point in the line of decisions, which now fix the exclusive power of Congress, Justice CURTIS thought this case authority that the States might legislate in the absence of Congressional legislation: *Cooley v. Port Wardens* (1851), 12 How. (53 U. S.) 299, 319.

Though the Justices of the Court which had decided *Gibbons v. Ogden*, and *Wilson v. Marsh Co.*, passed away, there were immediately those among their successors who combated the inference drawn by TANEY and the Justices of his school of political thought. Thus, Justice McLEAN, in the *Passenger Cases*, (1849) 7 How. (48 U. S.) 283, 397, pointed out that the language used, while less guarded than usual, should be construed in reference with the question before the Court, especially as *Gibbons v. Ogden* was cited and not even distinguished, much less overruled; and in *Cooley v. Port Wardens* (1851), 12 How. (53 U. S.) 299, 324, again alluded to this case as an illustration of the difficulty of restraining to the facts of the case, so important a principle as that supposed to lie in this opinion. In the *Wheeling Bridge Case*, the same Justice distinguished this case as different in principle, adding, in his understanding of the opinion, that—

The Chief Justice [MARSHALL had virtually] said it was a matter of doubt whether the small creeks, which the tide makes navigable a short distance, are within the general commercial regulation, and that in such cases of doubt, it would be better for the Court to follow the lead of Congress: (13 How. 54 U. S. 566.)

In *Gilman v. Philadelphia* (1866), 3 Wall. (70 U. S.) 713, 743, Justices CLIFFORD, WAYNE and DAVID DAVIS thought that no man living had any reason to suppose that the views of MARSHALL and his associates had changed, between *Gibbons v. Ogden* and *Wilson v. Marsh Co.* As these dissenting Justices held this case second in point of importance to no one delivered by MARSHALL, they considered that it decided the dam in question to have been erected under the reserved police powers of the State. Justice CLIFFORD repeated these sentiments in his concurring opinion in *Hall v. De Cuir* (1877) 5 Otto. (95 U. S.) 485, 514, 516, with approving mention of Justice McLEAN's statement, *supra*.

In *Cardwell v. American River Bridge Co.* (1884), 113 U. S. 205, Justice FIELD cited this case and those following it, with the explanation that—

These cases illustrate the general doctrine, now fully recognized, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exerted, are national in their character, and admit and require uniformity of regulations affecting alike all the States, and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management, until Congress intervenes and supersedes their action: (Id.)

To the same effect, per *Bradley, J. Willamette Iron Bridge Co. v. Hatch* (1887), 125 U. S. 1, 8; *Lamar, J. Kidd v. Pearson* (1888), 128 Id., 1, 23.

VII.

A state may legislate for the safety, happiness and prosperity of its inhabitants, except when it is restrained by the Constitution of the United States.

A state may require the commander of a vessel arriving at a port within its jurisdiction, to report his passenger list.

The Mayor, etc., of New York v. Miln (1837), 11 Peters (36 U. S.) 102, raised the question of the constitutionality of

another statute of New York (that of February 11, 1824), under which an action was begun in the Superior Court of that city against the consignee of the ship *Emily* for not reporting the passenger list. The consignee being an alien, removed the case into the Circuit Court of the United States and demurred to the declaration: on a division of opinion between the judges, the question of the constitutionality of the section requiring the certificate by the captain of such passenger list, was certified into the Supreme Court: See page 145 of the report, and per Justice WAYNE, in the *Passenger Cases* (1849), 7 Howard (48 U. S.) 430. That section was thus summarized by Justice BARBOUR:—

The statute, among other things, enacts that every master or commander of any ship or other vessel arriving at the port of New York from any country out of the United States, or from any other of the United States than the State of New York, shall, within twenty-four hours after the arrival of such ship or vessel in the said port, make a report in writing, on oath or affirmation to the Mayor of the City of New York, or, in case of his sickness or absence, to the Recorder of the said City, of the name, place of birth and last legal settlement, age and occupation of every person who shall have been brought as a passenger in such ship or vessel, on her last voyage from any country out of the United States into the port of New York, or any of the United States, and from any of the United States other than the State of New York to the City of New York, and of all passengers who shall have landed, or been suffered or permitted to land from such ship or vessel, at any place, during such her last voyage, or have been put on board, or suffered, or permitted to go on board of any other ship or vessel, with the intention of proceeding to the said City, under the penalty on such master or commander, and the owner or owners, consignee or consignees of such ship or vessel, severally and respectively of seventy-five dollars for every person neglected to be reported as aforesaid and for every person, whose name, place of birth, and last legal settlement, age, and occupation, or either or any of such particulars shall be falsely reported as aforesaid, to be sued for and recovered as therein provided.

Justice STORY, in his dissenting opinion, made a fuller statement (page 153) though disclosing no other matters to influence the decision.

The case was first reached during the lifetime of MARSHALL, in January term, 1835, but the Court declined to consider it until a vacancy in the bench occasioned by the resignation of Justice Duval should be filled: 9 Peters (34 U. S.) 85. Chief Justice MARSHALL died at Philadelphia, July 6, 1835, and one of the counsel for the State of Maryland in the *Brown* case,

ROGER BROOKE TANEY, was appointed to the vacancy and confirmed December 26, 1835. The case was then argued without result, as the Justices were equally divided in opinion, and before the case was again reached, President Jackson appointed PHILIP PENDLETON BARBOUR, March 15, 1836, to the vacant Justiceship. Upon the final disposition of the case, the Chief Justice and Justice McLEAN, agreed with Justice BARBOUR in the opinion read by the latter; Justice STORY dissented; Justice THOMPSON wrote the opinion which a majority of the other Justices could not agree to; he then read it as his individual opinion; Justice BALDWIN afterwards wrote a separate opinion: about his assent to the opinion read by Justice BARBOUR there seems to be doubt: See the remarks of Justice WAYNE and Chief Justice TANEY in the *Passenger Cases* (1849), 7 How. (48 U. S.) 283, 429, 487; and Justice WAYNE, assented to the opinion of the Court only so far as to agree that the law of New York was valid as a police regulation. For this reason Justice BARBOUR could only express his own opinion, that passengers were not the subject of commerce, and declare—

But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered, or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conclusive to these ends; when the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation or what may, perhaps, more properly be called internal police are not thus surrendered or restrained, and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive: (11 Peters, 36 U. S. 139.)

A consequence grew out of this language which was repudiated in the *Passenger Cases* by Justices McLEAN and WAYNE with the other Justices composing the majority of the Court; that is, that the State could exercise its authority from the first instant of the termination of a voyage, in direct opposition to the principles of *Brown v. Maryland*.

The dissenting opinion of STORY was placed upon the broad ground that a State could not legislate in such a manner as to act upon subjects either within or beyond its territorial limits, if such action trespassed upon an exclusive authority of Congress to regulate commerce, including passenger traffic: (11 Peters, 36 U. S. 156, 158.) This is, of course, open to the criticism of Justice THOMPSON, that the Court had not defined the bounds of Congressional authority, and to that of KENT, (*ante*, page 430) that it is not a question of State power, but how far may the State go on legislating until there is a collision with the power confided to Congress; but it was, in effect, adopted in the *Passenger Cases*, *infra*.

This opinion of STORY, he tells us himself, at the close of this dissenting opinion, was concurred in by the then late Chief Justice MARSHALL.

Justice BALDWIN's concurring opinion should be read in connection with the prefatory remarks to his General View of the Origin and Nature of the Constitution and Government of the United States:

As my opinions on constitutional questions are founded on a course of investigation different from that which is usually taken, I cannot, in justice to myself, submit them to the profession without a full explanation of what may be deemed my peculiar views of the Constitution. By taking it as the grant of people of the several States, I find an easy solution of all questions arising under it; whereas, in taking it as the grant of the people of the United States in the aggregate, I am wholly unable to make its various provisions consistent with each other, or to find any safe rule of interpreting them separately. (Id. 1.)

This method of viewing the Constitution is worthy of this passing notice because BALDWIN agreed with the judgment of the Court in *Brown v. Maryland* and *Gibbons v. Ogden*. Those judgments were entered upon opinions by Chief Justice MARSHALL, whose view of the Constitution was directly opposite:—

The powers of the General government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be sub-

mitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect Union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the State governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties: *McCulloch v. The State of Maryland* (1819), 4 Wheat. (17 U. S.) 402—404.

The substance of this concurring opinion is still and is likely to remain, the interpretation, in this direction, of the commerce clause; it is as follows:—

It may therefore be taken as an established rule of constitutional law, that whenever anything which is the subject of foreign commerce, is brought within the jurisdiction of a State, it becomes subject to taxation and regulation by the laws of a State so far as is necessary for enforcing the inspection and all analogous laws, which are a part of its internal police. And as these laws are passed in virtue of an original inherent right in the people of each State to an exclusive and absolute jurisdiction and legislative power, which the Constitution has neither granted to the general government, nor prohibited to the States the authority of these laws is supreme and incapable of any limitation or control by Congress: *Bald. Views*, 188.

The construction of this clause of the Constitution would therefore seem to be more uniform than the diverse political views of the Judges might imply.

The judgment in this case decides nothing more than that a State may require the name and quality of every foreigner landing within its borders: *WAYNE, J., Passenger Cases* (1849),

7 How. (48 U. S.) 283, 423, 425. And in this respect, has been recognized as good law by Justice MILLER in the *Slaughter House Cases* (1873), 16 Wall. (83 U. S.) 36, 63, and in *Henderson v. The Mayor* (1876), 92 U. S. 259, 269, and *infra*; and by Justice SWAYNE in *Machine Co. v. Gage* (1880), 100 U. S. 676, 678.

The precise point decided must always be regarded in the use of this case, as the principles of MARSHALL were there seriously impugned, and remained so during a period of fourteen years, during which the divided Court agreed upon the judgment in the *License Cases* and with more unanimity of reason decided the *Passenger Cases*. With *Cooley v. Port Wardens*, the principles of MARSHALL began again to prevail in the Court, though the Justices have not yet been able to reach one opinion. This is probably because they have not been able to settle in their own minds, a reasonable definition of the police power of the States.

VIII.

The power to regulate commerce among the several States is granted in the same clause, and by the same words, as that with foreign nations, and is co-extensive with it.

Congress has the exclusive power to regulate commerce among the States, though it has been supposed that the States might act until Congress interfered.

State laws requiring a license to sell liquors brought from a foreign nation, or another State, were considered to be valid, but now they are declared to be void so far as respects their sale by the importer in the original package.

Pierce et. al. v. The State of New Hampshire (1847), 5 Howard (46 U. S.) 505, was one of three cases heard and decided together and commonly known as the *License Cases*. This case came before the highest court, the Supreme Court of Judicature, in July Term, 1843, on a writ of error to a judgment entered in the Court of Common Pleas at the preceding January Term, upon an indictment for selling a barrel of gin, in violation of the State Act of July 4, 1838, which was—

AN ACT regulating the sale of wine and spirituous liquors.

SECTION 1. Be it enacted by the Senate and House of Representatives, in General Court convened, That if any person shall, without license from the selectmen of the town or place where such person resides, sell any wine, rum, gin, brandy or other spirits in any quantity, or shall sell any mixed liquors, part of which are spirituous, such person so offending, for each and every such offence, on conviction thereof, upon an indictment in the county wherein the offence may be committed, shall forfeit and pay a sum not exceeding fifty dollars, nor less than twenty-five dollars, for the use of such county.

The object of this Act, as well as of the laws questioned in the other two License Cases, was to discourage the use of ardent spirits, just as in the *Original Package Case* of 1890.

The defendants had purchased this barrel of gin in Boston, Massachusetts, had brought it to their store in Dover, New Hampshire, and had there sold and delivered it in its original condition. The gin was of American manufacture and the commerce clause of the Constitution was unsuccessfully invoked as a sufficient excuse for the sale without a license. Thus the law remained until 1890, while its downfall was being prepared by a line of cases commencing in 1851, though indicated as early as the *Passenger Cases*, in 1849.

The contention in this case raged over the effect of the decisions in *Brown v. Maryland* and *Miln v. New York*, with such violence that the Justices of the Supreme Court of the United States could not agree upon the principles by which they severally thought the State license laws were constitutional. The divergences of opinion are summarized by Justice GRAY in his dissenting opinion, in the *Original Package Case*, *infra*, where he points out that Chief Justice TANEY (page 578,) and Justices CATRON and NELSON agreed in regarding the New Hampshire statute as a regulation of interstate commerce, but still valid for the reason that Congress has not yet regulated that particular kind of traffic; while Justices MCLEAN, DANIEL, WOODBURY and GRIER, were of one mind in holding the statute a police regulation, for the preservation of public health and order; otherwise the Justices did not agree. The effect of this judgment of a divided Court was far more extensive than any student of jurisprudence would have been justified in predicting, for it became the basis for prohibition

Constitutions and laws, and generally passed into the popular knowledge as an affirmation of the police power of the States.

The great difficulty among the Justices of the Supreme Court, was the effect of a grant of power to Congress; did it amount to a prohibition to the States, so as to render all State laws on the subject, null and void? To those who answered in the negative, the case of *Brown v. Maryland*, was easily distinguishable. As already pointed out with some care, that was a case of a foreign import. In these *License Cases*, the case related to commerce among the States, and upon a subject upon which Congress had not legislated. Still the decision in *Brown v. Maryland*, could have easily extended to forbidding State regulation of the sale of Original Packages in the hands of those who brought them from a neighboring State; and now that such extension has been made, in the *Original Package Case*, *infra*, these decisions in the *License Cases* are valuable only for the precise points involved in the several judgments of the Court.

The other two License Cases were *Thurlow v. The Commonwealth of Massachusetts* and *Fletcher v. The State of Rhode Island*. In the former case, the State laws allowed the county commissioners to refuse to grant any licenses for the sale of liquor, being in effect a local option act. The defendant had been convicted, under these laws, of retailing without a license, liquors purchased from an importer, and Webster once more raised the plea of the exclusive jurisdiction of Congress (as he had done in *Gibbons v. Ogden*), by putting the question, whether such a State law, founded upon moral, medicinal, economical or other reasons for promoting the public good, could prevent the importer from selling to one who would only buy to sell again. The Court, for various reasons, affirmed the validity of the Massachusetts laws.

In the Rhode Island case, there was a local option law and a refusal to license. The defendant bought French brandy from the importer and sold it again at retail, so that this case differed from the Massachusetts case only in the fact that the liquor was undoubtedly of foreign make. The argument here assumed the form that no article was an import or an export, but that the importation was merely an event in the his-

tory of the article: from this the argument concluded that any tax upon the thing, even after the original package had been broken, would be void. This was also denied by the Court for various reasons.

These cases are worthy of some examination here, in addition to the review given them in the *Original Package Case*, (*infra*) as the judgments rendered sustained the constitutionality of laws passed, according to Justice CATRON, (5 How. 46 U. S. 601) with a view to the entire prohibition of the liquor traffic. The State Courts in the prohibition States, naturally followed this judgment; thus, in Iowa, the now so-called *Original Package Case*, (*infra*) was decided expressly in the State Court (October 4, 1889) upon the authority of the previous case of *Collins v. Hills*, decided February 7, 1889, where an injunction to prevent a nuisance was sustained. The nuisance was the selling of original packages or cases of beer brought from an adjoining State; and in sustaining the injunction, REED, C. J., made this reference:

The Statutes called in question in the *License Cases*, 5 How. 504, were not essentially different in their object, from those of this State. They were enacted for the purpose of mitigating, and to some extent, suppressing, the evils of intemperance. * * The same claim of right was urged in these cases, that is here alleged by the defendant, viz.: that as the liquors were transported into the States under the authority of the Federal Constitution and statutes, it was not competent for the States to prohibit their sale, or regulate the manner in which it should be conducted. But the Court held that the statutes were not in their operation in conflict with the commercial provisions of the Federal Constitution. And it appears to us that this is necessarily so. * * * When property purchased in another State, is transported to this State, and there delivered to the purchaser, to be used or consumed within the State, the transaction, in so far as it is governed by the provisions for the regulation of commerce among States, is at an end.

The denial of the proposition contained in this last sentence, is the substance of such cases as the *Original Package Case* of 1890.

As already noticed on page 421, there was an effort in this case to secure the assent of the Court to the proposition that a State might declare the liquor traffic injurious and calculated to introduce immorality, vice and pauperism, and consequently might forbid the sale of liquor. This proposition was denied by the Chief Justice—

But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight and human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists: (5 How, 46 U. S. 576-7.)

This statement is repeated by Chief Justice FULLER, in the opinion of the court in the *Original Package Case*, *infra*.

Justice CATRON took the other and equally unfavorable view of the same assumption of power by a State, over interstate commerce, already alluded to. This was cited by Justice FIELD, (concurring opinion in *Bowman v. RR. Co.*) in support of his own statement, that—

What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any State: (125 U. S. 501.)

In the dissenting opinion of Justice GRAY, *infra*, the judgment in these *License Cases*, is said to have been treated as beyond question in a long series of cases reaching from *Viasie v. Moore* to *Mugler v. Kansas*. The first of these cases was decided in 1852 (14 How. 55 U. S. 568), by nearly the same Justices as the *License Cases*, and the utmost that can be said of this recognition is that the new Justice (CURTIS) concurred though he had written the opinion in *Cooley v. Port Wardens* in 1851, without noticing the *License Cases*.

The next case mentioned, was *Sinnot v. Davenport* (1859), 22 How. 63 U. S. 227, a majority of the Court being composed of the same Justices, the two new Justices (CAMPBELL and CLIFFORD) concurring. But CLIFFORD and WAYNE dissented in the *Chestnut Street Bridge Case* (*supra*, page 445), which is the next cited.

None of these cases were decided upon the authority of the *License Cases*, and none of them do more than cite the principle of State action in the absence of Congressional regulation. But *Pervear v. The Comm.* (1866), 5 Wall. (72 U. S.) 475, 479, was a direct affirmance of the proposition, that the State had exclusive control of the sale of home made liquors, or those imported but in second hands; which always has been good law.

Another case cited by Justice GRAY, is *Woodruff v. Parham* (1868), 8 Wall. (75 U. S.) 123; but the *License Cases* were alluded to there only to aver a doubt if any material proposition was decided: MILLER, J., p. 139. And the same Justice barely mentioned the name in *Henderson v. The Mayor* (1875), 2 Otto (92 U. S.) 259, 274.

Still another citation is *Beer Co. v. Mass.* (1877), 7 Otto (97 U. S.) 25, 33, where Justice BRADLEY distinguished these and some other cases with the general concluding remark—

Of course, we do not mean to lay down any rule at variance with what this Court has decided with regard to the paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign nations and among the several States or otherwise: (Id. 33)

To the same effect is the citation of the coal case, *Brown v. Houston* (1885), 114 U. S. 622, 631, where the opinion was also written by Justice BRADLEY, who also wrote the opinion in another citation, that is, the modern License Case of *Walling v. Michigan* (1886), 116 U. S. 446, 461. But in this latter case, the *License Cases* were mentioned because the State Court thought the tax on the business of selling liquors to be shipped from another State, was justified by these and other cases. To this Justice BRADLEY replied—

None of these cases, however, sustain the doctrine that an occupation can be taxed, if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another State, or against the citizens of another State: (116 U. S. 461.)

The opinion in *United States v. DeWitt* (1870), 9 Wall. 76 U. S. 41, is also cited and it is supported by the citation of the *License Cases*, but only upon the point that Congress cannot exercise in the States police powers in the usual and restricted sense of the term (see page 413). There is no doubt of this.

Justice GRAY also cites *Mobile v. Kimball* (1880), 12 Otto (102 U. S.) 691, 701; but there Justice FIELD did not treat the *License Cases* as beyond question, for he first speaks of the difficulty of ascertaining what principle was here established, and then passed on to speak of the present rule of exclusion in national subjects (see pages 420 and 437, *supra*). And this was deliberate, for Justice FIELD, in his separate opinion in

Mugler v. Kansas (1887), 123 U. S. 623, 676 (which is another citation by Justice GRAY), said—

The construction of the commercial clause of the Constitution, upon which the *License Cases*, in the 7th of Howard, were decided, appears to me to have been substantially abandoned in later decisions. *Hall v. De Cuir* (1878), 95 U. S. 485; *Wellon v. State of Missouri* (1876), 91 Id. 275; *County of Mobile v. Kimball* (1880), 102 Id. 691; *Transportation Co. v. Parkersburg* (1882), 107 Id. 691; *Gloucester Ferry Co. v. Pennsylvania* (1884), 114 Id. 196; *Wabash, St. Louis & Pacific Railway Co. v. Illinois* (1886), 118 Id. 557. I make this reservation that I may not hereafter be deemed included by a general concurrence in the opinion of the majority: (123 U. S. 676.)

The majority of the Court composed of Chief Justice WAITE, and Justices MILLER, BRADLEY, HARLAN, MATTHEWS and GRAY, speaking by Justice HARLAN simply cited the *License Cases*, as sanctioning the power of the State to forbid the manufacture of liquor, in a case coming into the Court under the Fourteenth Amendment of the Constitution; that is, on the allegation that the privileges of a citizen had been abridged, and his property destroyed without due process of law.

Justice FIELD substantially repeated his sentiments in *Bowman v. RR. Co.* (1888), 125 U. S. 465, 507, where also Justice MATTHEWS analyzed the *License Cases* and concluded that the judgment was strictly confined to the right of a State to prohibit the sale of intoxicating liquor, after it had been brought within the territorial limits of the State: this was not the case in hand and no further reference was required or made in the opinion: (Id. 479.)

IX.

Commerce includes navigation and the transportation of passengers, both upon the high seas and in the bays, harbors, lakes and navigable waters within the United States.

A voyage is not ended until the passengers and merchandise have been landed and disbursed in the State.

A common carrier cannot be required by a State, to pay a capitation tax, or to be responsible for immigrants and interstate passengers.

Except to guard against disease or pauperism, a State cannot regulate immigration.

A State cannot collect the expense of maintaining paupers, or of executing its police laws, by a tax on immigrants.

Smith v. Turner and *Norris v. The City of Boston*, decided together in January Term, 1849, and reported in 7 How. (48 U. S.) 283-573, are also known as the *Passenger Cases*, from both of them declaring invalid a tax on aliens arriving at ports of the United States.

The case first named arose from certain sections of a law of the State relating to the marine hospital in the City of New York. Justice McLEAN explained that, by the seventh section—

"The Health Commissioner shall demand and be entitled to receive, and in case of neglect or refusal to pay, shall sue for and recover in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, viz:—

"1. From the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar.

"2. From the master of each coasting vessel, for each person on board, twenty-five cents; but no coasting vessel from the States of New Jersey, Connecticut and Rhode Island, shall pay for more than one voyage in each month, computing from the first voyage in each year."

The eighth section provides that the moneys so received shall be denominated "hospital moneys." And the ninth section gives "each master paying hospital moneys, a right to demand and recover from each person, the sum paid on his account." The tenth section declares any master who shall fail to make the above payments within twenty-four hours after the arrival of his vessel in the port, shall forfeit the sum of one hundred dollars.

By the eleventh section, the Commissioners of Health are required to account annually to the Comptroller of the State for all moneys received by them for the use of the marine hospital; "and if such moneys shall, in any one year exceed the sum necessary to defray the expenses of their trust, including their own salaries, and exclusive of such expenses as are to be borne, and paid as part of the contingent charges of the City of New York, they shall pay over such surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents in the City of New York, for the use of the Society:" (7 How. 48 U. S. 792-3.)

Under this statute, Smith, the master of the British ship *Henry Bliss*, was sued in the Supreme Court of New York, for one dollar each for two hundred and ninety-five steerage passengers. A demurrer was filed on the ground that the statute was a regulation of commerce and void. The Court

overruled the demurrer and the Court of Errors affirmed the action of the Supreme Court. Smith then removed the cause to the Supreme Court of the United States, where the judgment was reversed, with costs, on the ground laid in the demurrer. This judgment was agreed to by Justices McLEAN, WAYNE, CATRON, GRIER and McKINLEY, and dissented from by Chief-Justice TANEY and Justices DANIEL, NELSON and WOODBURY. All the Justices except NELSON, write separate opinions, Justices McLEAN and WAYNE going further in upholding the exclusiveness of the power of Congress than the other Justices composing the majority of the Court. As, however, it was a bare majority, the Court, twenty-six years later, in *Henderson v. The Mayor, infra*, considered the question afresh, though with the same result: MILLER, J., 92 U. S. 269-70, and in the *Head Money Cases* (1884), 112 U. S. 580, 592.

The importance of the decision appeared to Justice McLEAN to lie in the possibility of the tax imposed, operating to enforce non-intercourse between the States: (page 407.) As Mississippi had been allowed (*Groves v. Slaughter*, 1841, 15 Peters, 40 U. S. 504) to prevent citizens of other States from bringing in slaves as merchandise; as the State of Georgia had imprisoned a missionary (*Worcester v. Ga.*, 1832, 6 Peters, 31 U. S. 515) for preaching the gospel to the Cherokee Indians without a license from the Governor of the State; as the same State had attempted to prevent individual Indians from emigrating from the State (*Cherokee Nation v. Ga.*, 1831, 5 Peters, 30 U. S. 1, 8); as this case had followed the Miln case, and was followed by those of Crandall, Henderson and the Compagnie Generale Transatlantique, not to mention others; there was good cause for fearing non-intercourse State laws. If there would be any doubt, it is removed by Justice WOODBURY distinctly dissenting from fear that the laws of Mississippi, Ohio, and other States against the entrance of negroes, would be overthrown: page 567. The principle of the judgments, therefore, closely related to interstate traffic. Still, of course, the actual point decided was the invalidity of a tax on alien immigrants: DANIEL, J., page 495.

The second case, *Norris v. Boston*, was begun in the Boston Court of Common Pleas, by Norris, to recover two dollars

exacted for each alien passenger landed by him in the City of Boston, under an act of April 20, 1837, relating to alien passengers, and providing amongst other things—

SEC. 3. No alien passenger, other than those spoken of in the preceding section [i. e. lunatics, idiots, maimed, aged or infirm, etc.] shall be permitted to land, until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer, the sum of two dollars for each passenger so landed, and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers.

The judgment was the same as in the New York case, and the law was accordingly declared void as a regulation of commerce, without passing upon the other sections relating to lunatics and the like: per GRIER, J., page 457, who also differed from the other Justices of the majority in thinking (page 463) this law a tonnage tax, and so void; see page 425, *supra*.

All of the cases considered in this connection, depended upon MARSHALL'S definition of commerce as the intercourse of persons as well as traffic: *Henderson v. The Mayor* (1876), 2 Otto (92 U. S.) 259, 270, where Justice MILLER acknowledged this to be the accepted canon of construction on all subjects of commerce: STRONG, J., *R. R. Co. v. Husen*, (1878) 5 Otto (95 U. S.) 465, 470.

A determination was also called for, of the period of time when the commerce power ceased and the police or State power began. Upon this point, the result of the decision in these cases, when taken with that in *Brown v. Maryland* (*supra*, page 442), is to commit this determination to Congress and the Supreme Court. Justice McKINLEY thought it one of the most perplexing questions, and Congress not acting, the Court finally, in these *Passenger Cases*, and those to be presently noticed in this connection, laid down the rules stated above on pages 459, 460. They were affirmed by the opinion of Justice FIELD in *Gloucester Ferry Co. v. Pa.* (1885), 114 U. S. 196, 213.

The opposite view made the passenger liable as soon as he attempted to land: WOODBURY, J., *Passenger Cases*, page 537; of which the consequences must have been the same as those repudiated in *Brown v. Maryland*, respecting merchandise.

The State's right of taxation was also involved, as in *Brown v. Maryland*, but was denied on the different ground, that the law was not a quarantine regulation, because operating upon all passengers; otherwise, the law could not operate as the voyage had not yet been terminated: per McLEAN, J., page 400, sqq; WAYNE, J., page 411; CATRON, J., page 447.

The fact of the tax falling eventually on the passenger himself, no matter by whom paid in the first instance, was admitted in all these cases: WAITE, C. J., in *W. U. Tel. Co. v. Texas* (1882), 15 Otto (105 U. S.) 460, 465; MILLER, J., *Henderson v. The Mayor* (1876), 2 Otto (92 U. S.) 259, 268; *Cook v. Pa.* (1878), 7 Otto (97 U. S.) 566, 572, and *Morgan v. La.* (1886), 118 U. S. 455, 462; MATTHEWS, J., *Bowman v. R. R. Co.* (1888), 125 Id. 465, 492.

The supremacy of treaties was also considered, but not necessarily; see above, page 416.

The power of a State to exclude immigrants, was denied with full cognizance of the decision in *Groves v. Slaughter* (1841), 15 Peters (40 U. S.) 449, which was distinguished as relating to Slaves, over whom the commerce power did not extend. Justice McKINLEY would have decided these *Passenger Cases* upon this point (page 453); Chief-Justice TANEY held the same view, though with the opposite opinion of the law (page 465). And yet *Groves v. Slaughter* actually decided nothing more than that the Constitution of Mississippi did not apply to the promissory notes in suit: if it had applied, then the right of a State to exclude persons, even if slaves, would have been decided, and the *dicta* of the different Justices worthy of consideration in this article.

The principle of this New York law was repeated by an act of Nevada, passed March 9, 1865, requiring passenger transporters for hire to pay a tax of one dollar upon every person leaving the State. The State Supreme Court (*Ex parte Crandall*, 1865, 1 Nev. 294,) sustained the law chiefly by the principles of the dissenting opinion of Chief Justice TANEY in the *Passenger Cases*. This State Court was unanimous in holding that the mere grant of power to Congress, could not imply a prohibition upon the State, but was a mere concurrent power, as laid down by KENT, *supra*, page 430: and concluded that—

The better rule, and that sustained by the preponderance of authority, seems to be that subject and subordinate to the power of Congress, a State may regulate commerce within its own jurisdiction, and its laws enacted for that purpose are unconstitutional only when they conflict with, or are repugnant to some act or regulation of the General Government. This rule removes all possible difficulties * * * In other words, the States are enabled to protect themselves, not from the laws or constitutional authority of Congress, but from its inaction: LEWIS, C. J., 1 Nev. 313.

Crandall did not appear in the Supreme Court of the United States, but counsel for the State did, and curiously presented a brief containing not a word on the *Passenger Cases*, though the opinion of the Nevada Court, printed in the record, did admit the opinions and reasonings of Justices McLEAN, WAYNE and GRIER, to be unmistakably in conflict with their position. They pointed out that Justice CATRON had agreed to the judgment only on account of certain laws of Congress, and therefore concluded that the *Passenger Cases* were not authority for the exclusive power of Congress.

The Supreme Court declared the Nevada law to be unconstitutional: *Crandall v. Nevada* (1868), 6 Wall. (73 U. S.) 35, by a Court divided upon the particular Constitutional power, which has been transgressed in taxing passengers. Chief Justice CHASE and Justice CLIFFORD holding it to be a regulation of commerce, and Justice MILLER, in the opinion of the Court, with assent of Justices SWAYNE, DAVID DAVIS, NELSON, GRIER, MILLER and FIELD, thought otherwise and declared the invalidity of the law on the other ground of a conflict with these implied powers which prevent a State from affecting the functions of the government. This seems an extension of the principles of *McCulloch v. Maryland* (1819), 4 Wheat. (17 U. S.) 316, to hold that the travelling of citizens and aliens on private business was a function of the government; and subsequently Justice MILLER cited this Crandall case as avoiding a tax on commerce, in *Woodruff v. Parham* (1869), 8 Wall. (75 U. S.) 123, 138, and in *Fargo v. Stevens* (1887), 121 U. S. 230, 241; though still recognizing his original ground in *Hinson v. Lott* (1869), Id. 148, 152, in the *Slaughter House Cases* (1873), 16 Wall. (83 U. S.) 36, 79, and, justly, when dissenting, in *B. & O. RR. Co. v. Md.* (1875), 21 Wall. (88 U. S.) 456, 475; as was pointed out by STRONG, J., in *State Freight*

Tax Case (1873) 15 Wall. (82 U. S.) 232, 280; and by MATTHEWS, J., with approval, in *Moran v. N. O.* (1884), 112 U. S. 69, 73.

This case was recognized as annulling a tax upon commerce, between the States, by BRADLEY, J., in *B. & O. RR. Co. v. Miln*, *supra*; in *Transportation Co. v. Parkersburg* (1883), 17 Otto (107 U. S.) 691, 702, and in *Phila. & S. M. S. Co. v. Pa.* (1887), 122 U. S. 326, 339; by BLATCHFORD, J., in *Pickard v. Pullman S. C. Co.* (1886), 117 U. S. 34, 48.

As in the *Miln* case, a portion of the State Statute not considered by the Court for technical reasons, required a bond from the master for every passenger, conditioned for the maintenance of the passenger and his children, if they became paupers within two years; so in these *Passenger Cases*, substantially that provision came to be considered and found void. Immediately, the State modified the statute so as to require a report similar to that in the *Miln* case (*ante*, page 449), and to further require the Mayor of the City to endorse on this report a demand for a bond for four years indemnity, or the sum of one dollar and fifty cents, per passenger, under a penalty of five hundred dollars for each passenger: per MILLER, J., *Henderson v. The Mayor* (1876), 2 Otto (92 U. S.) 259, 266. This attempt of the State was also a failure, as was also the next one, attempted by Act of May 31, 1881, to require one dollar for each alien passenger, for the execution of the State inspection laws: *N. Y. v. Compagnie* (1882), U. S. Cir. Ct., S. Dist., N. Y. 10 Fed. 357, 360, 365; affirmed, 107 U. S. 59; and a similar law in Louisiana was also declared unconstitutional, for the same reason of interfering with commerce: *Commissioners of Immigration v. North German Lloyd* (1876), 2 Otto (92 U. S.) 259. So, also, "a most extraordinary statute" of California, requiring similar bonds from the vessel master, owner or consignee, whenever the State Commissioner of Immigration has satisfied himself of the arrival (in this case) of lewd and debauched women; with a commutation fee to be fixed by the Commissioner himself, whose perquisite was twenty per centum of the commutation moneys: *Shy Lung v. Freeman* (1876), 2 Otto (92 U. S.) 275, 277, 278.

As the States could not exact a tax upon commerce, some of

the consignees of foreign vessels also thought that there was no power to tax in the government of the United States, and brought suit to recover the sums required to be paid for each immigrant by Act of Congress of August 3, 1882 (23 Stat. at Large 214). The suit failed, as both the Circuit Court (in an opinion by Justice BLATCHFORD, *Edye v. Robertson*, 1883, U. S. Circ. Ct. E. Dist. N. Y. 18 Fed. Repr. 135), and the Supreme Court in an opinion by Justice MILLER, *Head Money Cases*, 1884, 112 U. S. 580, 596), held this Act to be a valid exercise of the commerce power.

X.

Whatever subjects of the Constitutional power to regulate commerce, are, in their nature, national, or admit only of one uniform system or plan of regulation, they are exclusively in the power of Congress to regulate or not.

A State law regulating pilots is valid until it comes into collision with an Act of Congress.

Cooley v. The Board of Wardens of the Port of Philadelphia (1851), 12 How. (53 U. S.) 299, originated (April 3, 1847) in a proceeding before Alderman Thomas D. Smith of the City of Philadelphia, for the recovery of eight dollars and forty-four cents, claimed of A. B. Cooley, consignee of the schooner *Emily*, as half pilotage incurred under the Twenty-ninth section of the act of March 29, 1803, P. L. 542, 560, in consequence of the refusal of the master to take a pilot on an outward voyage to a port not within the River Delaware. The Section of the statute proceeded under, provided:—

SEC. 29. *And be it further enacted by the authority aforesaid, That every ship or vessel arriving from, or bound to any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from or bound to any port not within the river Delaware, shall be obliged to receive a pilot; and it shall be the duty of the master of every such ship or vessel during thirty-six hours next after the arrival of such ship or vessel at the city of Philadelphia, to make report to the master warden of the name of such ship or vessel, her draught of water, and the name of the pilot who shall have conducted her to the port, and where any such vessel shall be outward bound, the master of such vessel shall make known to the wardens the name of such vessel, and of the pilot who is to conduct her to the capes, and her draught of water at that time;*

and it shall be the duty of the wardens to enter every such vessel in a book, to be kept by them for that purpose, without fee or reward; and if the master of any ship or vessel shall neglect to make such report, he shall forfeit and pay the sum of sixty dollars, and if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner or consignee of such vessel, shall forfeit and pay to the wardens aforesaid, a sum equal to the half pilotage of such ship or vessel, to the use of the society for the relief of distressed and decayed pilots, their widows and children, to be recovered as pilotage in the manner hereinafter directed: (P. L. 1802-3, pp. 560-1.)

Judgment was duly rendered against Cooley who appealed to the Court of Common Pleas, where the judgment was affirmed, November 22, 1847; as also happened on appeal in the State Supreme Court, January 31, 1850, and, on final appeal in the Supreme Court of the United States, December Term, 1851. The law of Pennsylvania and similar statutes were thus declared to be valid, and not in contravention of those clauses of the Constitution, which require uniformity in duties, imposts and excises, and which grant Congress the power to regulate commerce: (*supra*, pages 420, 424, 425; and also *Packet Co. v. Keokuk*, 1877, 5 Otto, 95 U. S. 80, 88; *Wilson v. McNamce* 1881, 12 Otto, 102 U. S. 572, 575; Justice BLATCHFORD in *Turner v. Maryland* 1883, 17 Otto, 107 U. S. 38, 56; and Justice BRADLEY, in *Transportation Co. v. Parkersburg* 1883, Id. 691, 702, 703; and *Owachita Packet Co. v. Aiken* 1887, 121 U. S. 444, 447); nor of a coasting license, as in *Gibbons v. Ogden*; nor of the United States Statutes, except where they collide (similarly, *Steamship Co. Joliffe*, 1864, 2 Wall. 69 U. S. 450, per FIELD, NELSON, GRIER, and SWAYNE, JJ., against MILLER, WAYNE and CLIFFORD, JJ., dissenting).

This precise question was again before the Court in 1872 (*Ex parte McNiel*, 13 Wall. 80 U. S. 236, 242), and the Court unanimously reaffirmed the decision in *Cooley v. Port Wardens*, Justice SWAYNE saying that they were entirely satisfied with that adjudication. The other concurring members of the Court were Chief Justice CHASE, and Justices DAVID DAVIS, STRONG, CLIFFORD, MILLER, FIELD, and BRADLEY; Justice NELSON not sitting through illness.

The opinion of the Court in *Cooley v. Port Wardens*, was written by Justice CURTIS, who had been appointed September

22, 1851, from the bar of Boston, Massachusetts. The concurring Justices were TANEY, Chief Justice, and CATRON, McKINLEY, NELSON and GRIER, Associate Justices. Justice McLEAN dissented, because State pilot laws could have no force as regulations of commerce, until adopted by Congress (pages 322-3); Justice WAYNE also dissented, and Justice DANIEL agreed only to the judgment, because the Constitutional power over commerce did not appropriately and necessarily extend to such local subjects as the means of precaution and safety, adopted within the waters or limits of a State, for the preservation of vessels, cargoes, navigators and passengers (page 326).

The subject of pilotage lies outside the bounds of this article, except so far as determining the exclusiveness of the Constitutional power over commerce and the authority of Congress to adopt local regulations.

The dissenting opinion of Justice DANIEL is not far removed in principle from that of the Court, for Justice CURTIS denied that there was any conflict between this Pennsylvania statute and the Tenth Section of the Constitution, (*supra*, page 425) because—

Indeed, the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the consequent impossibility of having its charges uniform throughout the United States, would be sufficient of itself, to prove that they could not have been intended to be embraced within this clause of the Constitution: for it cannot be supposed uniformity was required, when it must have been known to be impracticable: (12 How. 53 U. S. 314.)

The *Passenger Cases*, *supra*, really called for a decision upon the exclusiveness of the constitutional power, but the four Justices, who, with Justice McLEAN, composed the majority of the Court, differed from him in believing that a decision could be rendered without going to that extreme: WAYNE, J., page 411; CATRON, J., page 446; GRIER, J., page 462, who also thought that Congress had acted in confirming treaties which provided for the free admission of aliens. The position of Justice McLEAN has, however, since been adopted, with an important exception, in such cases, under the rule first formulated in *Cooley v. Port Wardens*, as a subject of national,

and even international character, and to be governed by uniform laws: MILLER, J., *Henderson v. The Mayor* (1876), 2 Otto (92 U. S.) 259, 272, 273; and *People v. Compagnie* (1883), 17 Otto (107 U. S.) 59, 60; CLIFFORD, J., concurring in *Hall v. DeCuir* (1878), 5 Otto (95 U. S.) 485, 497; FIELD, J., *Mobile v. Kimball* (1881), 12 Otto (102 U. S.) 691, 702; *Escanaba County v. Chicago* (1883), 17 Otto (107 U. S.) 678, 687; *W. U. Tel. Co. v. Pendleton* (1887), 122 U. S. 347, 357; BRADLEY, J., *Transportation Co. v. Parkersburg* (1883), 17 Otto (107 U. S.) 691, 702; *Robbins v. Taxing District* (1887), 120 U. S. 489, 492, and *Walling v. Mich.* (1886), 116 Id. 446, 455.

Chief Justice TANEY continued in the *Passenger Cases*, to hold the same opinion as in the *License Cases*, *supra*, page 454, gracefully dissenting in these words referring to the judgment in the latter *Cases* :—

I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this Court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported : (Page 470.)

The rule for testing the exclusiveness of the commerce power, as stated on page 466 was formulated by Justice CURTIS, while carefully deciding no more than the validity of the pilot laws before the Court (12 How. 53 U. S. 320); but this conclusion was reached through an affirmance of the national control of navigation (*supra*, page 428), an acknowledgment that pilot laws do constitute regulations of commerce and that Congress had already been compelled to intervene (12 How. 53 U. S. 316), and a statement that the law of Pennsylvania had not been interfered with by Congress (Id. 318); whereby the decision necessarily defined the powers remaining in the States.

This question has never been decided by this Court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this Court.

The grant of commercial power to Congress, does not contain any terms which expressly exclude the States from exercising an authority over its subject matter. If they are excluded, it must be because the

nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States.

If it were conceded on one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them.

And, on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States. then it would be in conformity with the contemporary exposition of the Constitution, (Federalist No. 32, *infra*), and with the judicial construction, given from time to time by this Court after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations: (*Sturgis v. Crowninshield* 1819, 4 Wheat. 47 U. S. 193; *Moore v. Houston*, 1820, 5 Wheat. 46 U. S. 1; *Wilson v. Black Bird Creek Marsh Co. supra*, page 445.)

The diversities of opinion, therefore, which have existed on this subject have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. * * *

Either absolutely to affirm or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable, but to a part. Whatever subjects of this power are, in their nature, national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress: CURTIS, J., *Cooley v. Port Wardens* (1851), 12 How. (53 U. S.) 318-20.

This statement of the exclusiveness of the Constitutional power has been recognized as correct by Justice GRAY, dissenting in the *Original Package Case, infra*; Justice MATTHEWS, in *Bowman v. Chicago & N. W. R.R. Co.* (1888), 125 U. S. 465, 481; Justice FIELD, Id. 508; Justice BRADLEY, in *Phila. Steamship Co. v. Pennsylvania* (1887), 122 U. S. 326, 339; in *Robins v. Taxing District* (1887), 120 Id. 489, 492; in *Brown v. Houston* (1885), 114 Id. 622, 630, and

in *Ex parte Siebold* (1880), 10 Otto (109 U. S.) 371, 385; Justice CLIFFORD concurring in *Hall v. DeCuir* (1878), 5 Otto (95 U. S.) 485, 497, 516; Justice STRONG in the *Case of the State Freight Tax* (1873), 15 Wall. (82 U. S.) 232, 280; Justice MILLER, in *Henderson v. The Mayor* (1876) 2 Otto (92 U. S.) 259, 272, and in *Hinson v. Lott* (1869), 8 Wall. (75 U. S.) 148, 153, and in *Crandall v. Nevada* (1868), 6 Wall. (73 U. S.) 35, 42; Justice SWAYNE, in *Gilman v. Phila.* (1865), 3 Wall. (70 U. S.) 713, 721; though Chief Justice WAITE, not only in *Stone v. Mississippi* (*supra*, pages 411-12), but also in *Hall v. DeCuir* (1878), 5 Otto (95 U. S.) 485, 488, declared that—

The line which separates the powers of the States from this exclusive power of Congress, is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances, it would be a useless task to undertake to fix an arbitrary rule by which the line must, in all cases, be located. It is far better to leave a matter of such delicacy to be settled in each case, upon a view of the particular rights involved.

In addition to what has been already explained (pages 421, 422), a difficulty must be observed. Five years before *Gibbons v. Ogden* was decided, the same Justices held that the power conferred in the same section of the Constitution, to establish an uniform rule of naturalization and an uniform bankrupt law, were not exclusive. But such decision was rendered because these powers were said to be of a difficult description from those which require Congress to exercise exclusive powers; in the latter case, the rule was also plainly declared—

Whenever the terms in which a power is granted by the Constitution, to Congress, or wherever the nature of the power itself requires that it shall be exclusively exercised by Congress, the subject is as completely taken away from State Legislatures as if they had been forbidden to act upon it: MARSHALL, C. J. (1819), 4 Wheat. (17 U. S.) 122, 195.

The opposite view was believed by TANEY and WOODBURY to be the same as the construction given to the Constitution by the eminent men who were concerned in framing it, and active in supporting it: that is—

The necessity of a concurrent jurisdiction in certain cases, results from the division of the sovereign power ; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution. We there find, that notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses, prohibiting the exercise of them by the States. The Tenth Section of the First Article consists altogether of such provisions : The Federalist, No. 32.

All of which was, however, subject to the Sixth Article (*supra*, page 425), and consequently amounted in practice to no more than the position of KENT, to be again noticed presently.

Still there was no mere arbitrary division of the powers of Congress, and Justice McLEAN, in these *Passenger Cases*, considered the test to be the same as subsequently laid down in the line of cases beginning ten years latter with *Cooley v. Port Wardens* ; namely, the local action of the State in bankruptcies, as well as in governing the militia (see *Houston v. Moore* (1820), 5 Wheat. 18 U. S. 1), and this is probably what MARSHALL, meant—

If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that State legislation on the subject must cease : *Sturgis v. Crowninshield* (1819), 4 Wheat. (17 U. S.) 196.

At least, this seems to be the understanding of Justice BRADLEY, in *Robins v. Taxing District* (1887), 120 U. S. 489, 492, and the concurring Justices, MILLER, HARLAN, MATTHEWS, and BLATCHFORD. As Justice MATTHEWS did not sit, and Chief Justice WAITE dissented with Justices GRAY and FIELD, in the uniformity of the license, this understanding may be regarded as approved.

Against the exclusiveness of the Constitutional power, the practical position of KENT, *supra*, pages 421, 430, was frequently opposed, and as often denied : in the *Passenger Cases*, the judgment of the Court was the first to be placed upon the ground of exclusiveness, in denial of ungranted right in the

States to legislate until Congress might choose to act. The right not recognized as remaining in the State, would have compelled Congress to legislate in the negative. This was thought by Justice McLEAN in *Groves v. Slaughter* (1841), 15 Peters 40 U. S. 449, 504, to be as fatal to the spirit of the Constitution as it was opposed to its letter. Under the prevailing interpretation, there are some, like Justice WOODBURY in *Passenger Cases* 7. How. (48 U. S.) 560, who will regard the silence of Congress more formidable than its action; but all such persons do not wish to admit the full extent of the Constitutional powers.

In the course of his concurring opinion in *Gibbons v. Ogden*, Justice JOHNSON digressed to criticise the arguments advanced to establish the concurrent power of the State government, under the Tenth Section of the Constitution, *supra*, page 425; while merely *dicta*, the language is worthy of remark here:—

The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated, are no more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and when frankly exercised, they can produce no serious collision: (9 Wheat. 22 U. S. 235.)

Chief Justice MARSHALL, upon a view which appeared to him to be narrow, would have construed this Section with equal advantage to interstate commerce—

If it be a rule of interpretation to which all assent that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause, had the exception not been made, we know of no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited: *Brown Maryland*, 12 Wheat. 25 U. S. 438.

This rule of interpretation, was approved by Justice BALDWIN, in *Rhode Island v. Mass.* (1838), 12 Peters (37 U. S.) 657, 717; and a particular result, as applied to State taxation, was thought to be vital to the existence of the Constitutional

powers, by MARSHALL, C. J.; *McCullough v. Maryland* (1819), 4 Wheat (17 U. S.) 316; McLEAN, J., *Passenger Cases* (1849), 7 How. (48 U. S.) 283, 404, 406; CATRON, J., *Dred Scott v. Sandford* (1856), 19 How. (60 U. S.) 393, 528.

The dissent of Justice McLEAN being placed upon the action of Congress towards the State pilot laws, this would be an appropriate place to consider the effect of such Congressional action, but for the recent statute (*infra*), carrying out the suggestion of Chief Justice FULLER, in the *Original Package Case*. The subject will, therefore, be deferred until that statute is reached in the course of this article.

XI.

There is no State sovereignty which is exclusive of the Constitutional regulation of commerce.

An act of Congress admitting a State into the Union, or ratifying a compact between two or more States, is not a regulation of commerce, and the Constitutional power cannot be restricted in this manner.

A State may regulate its internal commerce, notwithstanding a condition of its admission into the Union, requiring freedom of the particular commerce afterwards regulated. Such condition operates only to prevent discrimination against the citizens of other States.

An injunction bill will lie in the Courts of the United States, to restrain an interference with commercial intercourse, which amounts to a nuisance, or creates irreparable damage, notwithstanding the absence of Congressional action, either upon the particular subject or generally, prohibiting and punishing nuisances.

A State may proceed in the Courts of the United States, to prevent or abate an obstruction to commercial intercourse growing out of State improvements.

Congress may legalise an interference with commercial intercourse.

A bridge over an interstate water-way, is not necessarily incompatible with navigation.

Congress can authorize the construction of bridges, dykes and other structures for the assistance of commerce.

The case of *The State of Pennsylvania v. The Wheeling & Belmont Bridge Co.*, began on the sixteenth of August, 1849, by the presentation of an injunction bill to Justice GRIER, sitting at Philadelphia, whereby the interference with navigation in the river Ohio was made the foundation for the complaint against a bridge, then in course of erection across the channel of the river at Wheeling. The cause was adjourned to the Supreme Court in banc, where in January Term, 1850, it was referred to ex-Chancellor Walworth, of New York, as commissioner, to report upon the facts: (9 How. 50 U. S. 657), Justice DANIEL dissenting here and always throughout the case, because he considered the Court without jurisdiction: (9 How. 50 U. S. 659; 13 How. 54 U. S. 594; 18 How. 59 U. S. 451); a question which cannot be pursued in this article for want of space.

The testimony having been taken (11 How. 52 U. S. 528), and counsel having cited the repeated refusal of Congress to authorize this bridge for the reason avowed in the bill, the Court proceeded to declare this suspension bridge a nuisance, to be abated by changing the elevation of the floor: (13 How. 54 U. S. 518, 578, 625). The opinion was written by Justice McLEAN, with the assent of Justices WAYNE, CATRON, McKINLEY, NELSON, GRIER and CURTIS; Chief Justice Taney and Justice DANIEL dissented, the latter, among other reasons, upon the matter of fact ground that the testimony did not disclose a nuisance: (Id. 602.)

The Chief Justice strenuously objected to the assertion of the power to abate a nuisance without an Act of Congress; and this not only upon his general principle that the State might act until Congress legislated, but, also, that there was no common law of the United States: (13 How. 54 U. S. 580.) Justice McLEAN, speaking for the majority of the Court upon the latter ground, claimed only the chancery jurisdiction conferred by the Judiciary Act, and now incorporated in the Revised Statutes as—

SEC. 723. Suits in equity shall not be sustained in either of the Courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law.

The power to enjoin is now firmly settled, as to questions of taxation and interference with commerce, by a long line of cases of which only a few need be mentioned here: *Transportation Co. v. Parkersburg* (1883), 17 Otto (107 U. S.) 691; the *Virginia Coupon Cases* (1885), 114 U. S. 311, 314, 315, 336, and citations, whose controlling principle was declared also by Chief Justice MARSHALL, in *Osborn v. The Bank* (1824), 9 Wheat. (22 U. S.) 738, 858-9; *Starin v. N. Y.* (1885), 115 U. S. 248, 257; also, *Irwin v. Dixon* (1850), 9 How. (50 U. S.) 10, 27, a case of an obstruction of ancient lights; *Davis v. Gray* (1873), 16 Wall. (83 U. S.) 203, 220, where a receiver appointed by a United States Circuit Court was aided against a State Governor; *Tennessee v. Davis* (1880), 10 Otto (100 U. S.) 257, 264, where a deputy collector of internal revenue was released from a charge of murder; *Cunningham v. Macon & B. RR. Co.* (1883), 109 U. S. 446, 455, where an injunction was refused because a State was a necessary party; *In re Ayers* (1887), 123 Id. 443, where a State officer was released from imprisonment for disobeying an injunction.

Upon the general subject of an interference with commerce, the decree was made because Congress had legislated in respect to the river, and the law of Virginia, authorizing the bridge, must give way to the paramount authority. The Congressional action consisted in approving the compact between the States of Virginia and Kentucky (*vide infra*), and per BRADLEY, J., *Transportation Co. v. Parkersburg* (1883), 17 Otto, (107 U. S.) 691, 705, and *Williamette Iron Bridge Co. v. Hatch* (1888), 125 U. S. 1, 16, but that does not affect the principle of the case, which was thus declared by Justice McLEAN (13 How. 54 U. S. 566), and recognized by Justice NELSON (18 How. 59 U. S. 430), and subsequently by Justice SWAYNE, in the Chestnut Street Bridge Case of *Gilman v. Phila.* (1866), 3 Wall. (70 U. S.) 713, 727. The distinction between this last case and the *Wheeling Bridge Case* is pointed out *infra*, page 482.

But for this effect of the approval, by Congress, of the compact, undoubtedly attention would have been given to the interference with the steamboat licenses, as in *Gibbons v. Ogden*, *supra*, as was actually the case in *Sinnott v. Davenport* (*infra*).

The entry of the final decree was deferred until the first Monday of February, 1853, to permit a voluntary abatement of the nuisance. Then, in 1854, the bridge was blown down by a violent storm, and while its reconstruction was under way, the complainant filed a new bill and obtained a preliminary injunction, June 26, 1854. This injunction was disregarded by the bridge company, and the bridge was reconstructed by November of the same year, under the authorization of two sections tacked on to the Post-office Appropriation bill, approved August 31, 1852 :—

SEC. 6. *And be it further enacted*, That the bridges across the Ohio river at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane's Island, in said river, are hereby declared to be lawful structures in their present position and elevation, and shall be so held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding.

SEC. 7. *And be it further enacted*, That the said bridges are declared to be and are established post-roads for the passage of the mails of the United States, and that the Wheeling and Belmont Bridge Company are authorized to have and maintain their said bridges at their present site and elevation ; and the officers and crews of all vessels and boats navigating said river, are required to regulate the use of their said vessels and boats, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of said bridges : (10 Stat. at Large 112.)

The bridge being legalized, all proceedings fell, including the punishment impending for disregarding the injunction. Justice NELSON wrote the opinion of the Court sustaining the constitutionality of the legalizing Act under the commerce powers, without entering at all upon the question of the power "to establish post-offices and post-roads," as to which Justice McLEAN came to an unfavorable conclusion, in his dissenting opinion (18 How. 59 U. S. 431, 441); but the subject cannot be considered here, at all.

Under the commerce powers, the Act was allowed to annul the decree of the Court, with explicit recognition of the general proposition that no act of Congress could ordinarily do so, and, in this case, could not do so as respects the costs, which the Bridge Company was compelled to pay (page 459); though as to this Justice DANIEL dissented.

But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction, depends upon the question, whether or not it interferes with the right of navigation. If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced: NELSON, J., 18 How. (59 U. S.) 431-2.

Justice McLEAN denied to Congress the power to authorize a bridge, as the Constitutional power was one of regulation and not construction: (13 How. 54 U. S. 623 and 18 How. 59 U. S. 442, 445); but the majority of the Court necessarily thought otherwise, and their view has remained the accepted construction. It is an inevitable consequence of the exclusiveness of the Constitutional power: *supra*, pages 420, 466; Justice NELSON, in *The Clinton Bridge* (1870), 10 Wall. (77 U. S.) 454, 462; Justice STRONG, in *S. C. v. Ga.* (1876), 3 Otto (93) U. S. 4, 13; Chief Justice CHASE, in the captured and abandoned property case of *U. S. v. Klein* (1872), 13 Wall. (80 U. S.) 128, 146; Justice SWAYNE, in *The Chicago & N. W. RR. Co. v. Fuller* (1873), 17 Wall. (84 U. S.) 560, 569; Justice MILLER, in *Stockdale v. Atlantic Ins. Co.* (1874), 20 Wall. (87 U. S.) 323, 332, and *Wisconsin v. Duluth* (1878), 6 Otto (96 U. S.) 379, 387; Chief Justice WAITE, in *Newport & Cin. Bridge Co. v. U. S.* (1882), 15 Otto (105 U. S.) 470, 475, 480, and Justice FIELD, dissenting in the same case, page 493; Justice BRADLEY, in the Arthur Kill bridge case of *Stockton v. B. & N. Y. RR. Co.* (1887), U. S. Cir. Ct., Dis't. N. J., 32 Fed. Repr. 9; s. c. 27 AMER. LAW REGISTER 775.

There was another objection to this Act of Congress, founded upon the preference clause of the Ninth Section of the Constitution (*supra*, page 424); this was denied by the majority of the Court, though advocated by Justice McLEAN, in his dissenting opinion. Want of space forbids further consideration than will be given in connection with *Munn v. Illinois*, *infra*.

In the last stage of the case Justice WAYNE agreed generally with Justice McLEAN in his dissent, and Justice GRIER to the extent of objecting to the Act of Congress.

The complainants insisted, in all stages of the case, that the compact between Virginia and Kentucky, must rule, for it provided—

SEC. 11. *Seventh*, that the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which will remain within the limits of this Commonwealth, lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed State on the river, as aforesaid, shall be concurrent only with the States which may possess the opposite shores of the said river: (Act of Virginia, passed December 18, 1789; 13 Hening's Stat., 17, 20; made part of Art. VIII. Const. 1792 of Kentucky and Art. VI. § 9, Const. 1799, and Art. VIII. § 9, Const. 1850.)

In their dissenting opinions, Chief Justice TANEY and Justice DANIEL both called attention (13 How. 54 U. S. 583, 601) to the peculiarly general terms upon which Kentucky had been admitted into the Union. This peculiarity also extended to the declaration of the equality of the State in the Union:—

CHAP. IV. *An Act declaring the consent of Congress, that a new State be formed within the jurisdiction of the Commonwealth of Virginia, and admitted into this Union by the name of the State of Kentucky.*

WHEREAS, the legislature of the Commonwealth of Virginia, by an Act, entitled "An Act concerning the erection of the District of Kentucky into one independent State," passed the eighteenth day of December, one thousand, seven hundred and eighty-nine, have consented that the District of Kentucky, within the jurisdiction of the said Commonwealth, and according to its actual boundaries at the time of passing the Act aforesaid, should be formed into a new State:

AND, WHEREAS, a convention of delegates, chosen by the people of the said District of Kentucky, have petitioned Congress to consent that, on the first day of June, one thousand, seven hundred and ninety-two, the said District should be formed into a new State, and received into the Union, by the name of "The State of Kentucky."

SECTION 1. *Be it enacted, etc.*, That the Congress doth consent, that the said District of Kentucky, within the jurisdiction of the Commonwealth of Virginia, and according to its actual boundaries on the eighteenth day of December, one thousand, seven hundred and eighty-nine, shall, upon the first day of June, one thousand, seven hundred and ninety-two, be formed into a new State, separate from and independent of the said Commonwealth of Virginia.

SECTION 2. *And be it further enacted and declared*, That upon the aforesaid first day of June, one thousand, seven hundred and ninety-two, the said new State, by the name and style of the State of Kentucky, shall be received and admitted into this Union, as a new and entire member of the United States of America.

APPROVED, February 4, 1791: 1 Stat. at Large 189.

This is the whole of the Act of Congress: still, Justice McLEAN (13 How. 54 U. S. 565), and especially Justice NELSON (18 How. 59 U. S. 433) treated this as an assent of Congress to the compact, following *Green v. Biddle* (1823), 8 Wheat. (21 U. S.) 1, 85. As this latter case remains unreversed, the opinion rendered by Justice NELSON is doubly interesting for the breadth of its scope:—

The question here is, whether or not the compact can operate as a restriction upon the power of Congress, under the Constitution, to regulate commerce among the several States? Clearly not. Otherwise Congress and two States would possess the power to modify and alter the Constitution itself.

This is so plain that it is unnecessary to pursue the argument further. But we may refer to the case of *Wilson v. Mason* (1801, 1 Cranch (5 U. S.) 88, 92, where it was held that this compact, which stipulated that rights acquired under the Commonwealth of Virginia shall be decided according to the then existing laws, could not deprive Congress of the power to regulate the appellate jurisdiction of this Court, and prevent a review where none was given in the State law existing at the time of the compact: NELSON, J., *Pa. v. Bridge Co.* (1855), 18 How. 59 U. S. 433.

Justice DANIEL did not proceed so fundamentally, as he was content to find in the compact no Congressional regulation: (13 How. 54 U. S. 601.) Others, as Chief Justice TANEY (*Id.* 584, citing *Pollard v. Hagan*) have been content to declare that all States, after the admission to the Union, are on an equal footing. This case and this principle have been repeatedly affirmed in commerce cases, in a line of decisions at present ending with *Willamette Bridge Co. v. Hatch*, mentioned in the next paragraph.

So far as the principles of *Wilson v. Marsh Co.*, and the *Wheeling Bridge Case*, could be affected by any compact between the States, or on their admission into the Union, a series of cases, beginning in 1845, and extending to March, 1888, not only confirm the opinion of Justice NELSON, just quoted, that the Constitutional power cannot be thus fettered; but also establish that the power of the States over commercial matters is equally unfettered. The whole subject was elaborately considered and the principal cases cited by Justice BRADLEY in the *Willamette Iron Bridge Co. v. Hatch* (1888), 125 U. S. 1, with the assent of Chief Justice WAITE and Justices

MILLER, FIELD, HARLAN, MATTHEWS, GRAY, BLATCHFORD and LAMAR. The general principle there laid down, declared that the freedom secured upon the navigable waters in and around the States subject to such compacts, was a political freedom, whereby discrimination against citizens of other States was prevented; but it was not any result of such Congressional regulation and care of those waters as might be assumed at any time.

The case originated in the United States Circuit Court for the District of Oregon, in an injunction proceeding for the abatement of a bridge over the Willamette River in the State of Oregon, erected by the authority of that State alone. The Circuit Judge, SAWYER, granted a preliminary injunction (April 21, 1881: 6 Fed. Repr. 780), and, after the testimony was taken, a final injunction (October 22, 1881; See 19 Fed. Repr. 349), because the Act of February 14, 1859, (11 Stat. at Large 383) admitting Oregon into the Union, required freedom in the navigable waters of the State. An appeal was taken but not prosecuted. After the decision in *Escanaba Co. v. Chicago*, in 1883, a bill of review was filed, but dismissed, upon demurrer, by the District Judge DEADY, with the concurrence of the Circuit Judge (March 3, 1884; 19 Fed. Repr. 347). This last decree was then taken to the Supreme Court and there reversed, with instructions to dismiss the original bill.

This Oregon Case differed from *Wilson v. Marsh Co.*; *Gilman v. Phila.*; *The Passaic Bridge Cases* (decided in 1857, by Justice GRIER sitting in the United States Circuit Court for the District of New Jersey, 6 AMER. LAW REGISTER 6; s. c. 3 Wall. (70. U S.) 782, appendix), in calling for a decision upon the effect of the terms of the Admission Act, and, in this respect, was precisely the same as the California case of *Cardwell v. The American River Bridge Co.* (1885), 113 U. S. 205, affirming s. c. (1884), 19 Fed. Repr. 562; the Mississippi case of *Hamilton v. Vicksburg S. & P. RR. Co.* (1886), 119 U. S. 280; the Illinois case of *Escanaba Co. v. Chicago* (1883), 107 Id. 678; the case of the Illinois river dam and lock (*Huse v. Glover*, 1883, U. S. Circ. Ct., N. Dist. Ill., 15 Fed. Repr. 292; affirmed, 1886, 107 U. S. 543); the Michigan case of *Sauls v. Manistee River Improv. Co.*

(1887), 123 Id. 288; and the judgment in each case was the same: that is, the legality of the bridge was sustained upon the principles mentioned on page 474, *supra*.

In the direction of Congressional action, this denial by Justice NELSON (*supra*, page 480), was broadly followed by Justice STRONG, with the assent of Chief Justice WAITE and all the other Associate Justices—CLIFFORD, SWAYNE, MILLER, DAVID DAVIS, FIELD, BRADLEY and HUNT, in *South Carolina v. Georgia* (1876), 3 Otto (93 U. S.) 4, 12, where a compact between those States was made the foundation of a bill in equity to restrain the obstruction of one of the channels of the Savannah river. Those States had agreed, April 24, 1787, that "the navigation of the river Savannah" in certain reaches, should "be henceforth equally free to the citizens of both States;" and in 1874, Congress had directed the erection of a crib for the improvement of the harbor of Savannah, which would prevent the free use of one channel. This compact was held to be of no strength against the commerce powers of the United States, conferred by the Constitution of 1789, and this *Wheeling Bridge Case* was distinctly made the foundation of the opinion.

The *Wheeling Bridge Case* has been already noticed in connection with *Wilson v. Marsh Co.*, *supra*, pages 446, 447, as differing in principle; though Chief Justice TANEY and Justice Daniel thought otherwise, and dissented: (13 How. 54 U. S. 580, 585, 599.)

That difference of principle can be readily seen by applying to the dam and to the bridge, the modified rule of *Cooley v. Port Wardens*, *supra*, page 466. Both affected navigable water, under State legislation, in the absence of particular Congressional action prohibiting the obstruction, though there were general laws of the United States regulating vessels. While a bridge might not, and this particular bridge, when sufficiently elevated would not be incompatible with the free navigation of the river; still the difference between the two cases lies in the geographical position of the water. If within a State, and purely internal, the State has entire control: McLEAN, J., 13 How. 54 U. S. 566 and 18 How. 59 U. S. 432; *Veazie v. Moor* (1852), 14 How. (55 U. S.) 568; and the *Chestnut Street Bridge*

Case, supra, page 445. If within a State, but forming a means of interstate commerce, Congress must act to restrain the State: *supra*, pages 445-8, and the cases there cited. If between two or more States, then the failure or refusal of Congress to act, will restrain the State from acting only when the waterway requires general regulation: *supra*, pages 466, 448.

The power of restraint which was established in the *Wheeling Bridge Case*, was recognized by Justice SWAYNE, in *Conway v. Taylor's Ex.* (1862), 1 Black. (66 U. S.) 603, 634; Justice CATRON, in *Miss. & M. RR. Co. v. Ward* (1863), 2 Black. (67 U. S.) 485, 495; Justice STRONG, in *U. P. RR. Co. v. Hall* (1876), 1 Otto (91 U. S.) 343, 355; Justice FIELD, in *Sherlock v. Alling* (1876), 3 Otto (93 U. S.) 99, 102, and in the Brooklyn Bridge Case of *Miller v. The Mayor* (1883), 109 U. S. 385, 396.

JOHN B. UHLE.

[The unexpected length of this article compels its division and the insertion of the latter part in the November number of this magazine.—ED.]

Supreme Court of Iowa.

COLLINS v. HILLS *et al.*

The original package is not broken and the law is not varied by selling liquors in the bottles in which they have been shipped from another State, although the bottles came packed in boxes and barrels, and were taken out and sold singly after their arrival.

Delivery of property to the consignee, subjects its ownership and sale in the original package, to the laws of the State where it is delivered.

The License Cases, supra, followed.

Appeal from the Superior Court of Keokuk County.

D. F. Miller, Sr., J. H. Anderson, H. Scott, Howell & Son, and *W. B. Collins*, for the plaintiff.

Anderson & Davis and *J. F. Smith*, for the defendants.

REED, C. J., February 7, 1889. This was an action in equity to enjoin the defendant from maintaining a nuisance. It is alleged in the petition, that the defendant kept, in a designated building in the City of Keokuk, a place in which he carried on the business of selling intoxicating liquors, in violation of the laws of this State. On the hearing, the Superior Court found that at the time, and in the place mentioned in the petition, the defendant kept certain intoxicating liquors, consist-

ing of whiskey and beer, and that he was then engaged in the business of selling the same; that he purchased the said liquors in the States of Ohio, Illinois and Missouri, and imported the same into this State.

The beer, when purchased, was put up in bottles, which were packed in cases, a certain number of bottles in each case; The only sale of beer made by the defendant, was by the case; this is, the cases were not opened by him, but were delivered to the purchasers in the same condition in which he received them from the carrier.

The whiskey was also put up in bottles. One brand, purchased in Ohio, was put up in quart bottles, in each of which was blown the name of the manufacturer, and each, when filled, was securely sealed with a metallic cap, and placed in a pasteboard box, and then the bottles were packed in boxes or barrels, for shipment. Another brand, purchased in Illinois, was put up in pint bottles, each of which, when filled, was securely closed and sealed, and these were also packed in boxes or barrels, for shipment, and were received by the defendant in that condition. His sales of whiskey were by the single bottle. On receiving the barrels and boxes in which the bottles were packed, he opened the same, and placed the bottles on the shelves in his store, and sold the same to his customers in such numbers as they required. He did not, in any instance, open the bottles, or sell the liquors in quantities less than that contained in them.

When he made the purchases, he intended to sell the liquors in this State in the manner pursued by him subsequently in making the sales. He was not a registered pharmacist, nor did he have a permit from the Board of Supervisors, to sell intoxicating liquors for the purposes for which such liquors are permitted to be sold by the statutes of the State. But the purchasers bought the liquors, intending to use the same as a beverage, and that intention was known to him when he made the sale.

The Superior Court held, in effect, that the transaction of selling the beer in the manner in which it was done, was beyond the power of the State to control or prohibit, but was purely a matter of conveyance between the States, which

could be regulated only by the Congress of the United States; also, that when the boxes and barrels in which the bottles of whiskey were shipped to and received by the defendant, were opened, and they were removed therefrom, the transaction, as a matter of interstate commerce, was fully consummated, and that subsequent dealings with the liquors were governed by the statutes of this State. And the judgment entered, was in accordance with those views. The findings of fact set out in the judgment, appear to be sustained by the evidence. And, in our consideration of the case, it will not be necessary to give much attention to the testimony. Both parties appealed, the plaintiff's appeal being first perfected.

The distinction drawn by the Superior Court between the different transactions, does not appear to us to rest upon any sound legal principle. The liquor was, in each case, put up by the manufacturer, or dealer, in another State, with a view to sales in that condition. The subsequent packing of the bottles in boxes and barrels, was a mere matter of convenience in the sale and shipment of the property. When the defendant purchased one hundred bottles, either of beer or whiskey, he, in effect, purchased that number of packages of the article, and when he sold by the bottle, the transaction was of the same character. The fact that, as a matter of convenience in handling during the transportation of the property, the bottles were packed in boxes and barrels, can make no difference as to the character, in law, of the transaction. If he had the right to bring the liquor within the State, and to sell it here, he had the right to adopt such means and mode of shipment as best suited his convenience or interest; for, so far as we are advised, there is no regulation upon the subject of either State or National enactment. The right to buy and sell in such quantities as he chose, is necessarily included in the right to buy and sell in any quantity. The right to bring it within the State by the car-load is as certain as the right to bring it in by the single bottle or other package. If his interest or convenience would be better served by shipping into the State in cars fitted up with tanks, or other vessels attached to the cars, and from which the liquors must be drawn at the end of the voyage, he had the right, in the absence of statutory regulation,

to adopt that mode of transportation. But in that case, the liquors, on their arrival within the State, would of necessity be placed in other vessels than those in which they were brought within the State; and the result of the distinction would be that, while he had the right to bring them within the State for the purpose of selling them here, yet, having brought them here in the exercise of that right, he had no right to sell them because he had adopted a mode of transportation which, although perfectly lawful, required their removal from the vessels in which they were transported. The unsoundness of the attempted distinction is shown by the absurd results to which it would lead. If he had the right to sell the liquors in the State because the transaction of their purchase and transportation was one of National, rather than State, jurisdiction, it follows necessarily that he had the right to make the sales in whatever form or quantity he saw fit. Any other holding, it seems to us, would lead to results and conclusions which owing to their absurdity, would be shocking alike to legal judgment and the common sense of mankind.

In our opinion, then, the case turns solely on the question whether defendant had the right, notwithstanding the statute of the State, to sell the liquors within the State. And in considering that question, it is important to keep in mind the scope and object of the statutes. For more than thirty years, the State has sought by legislative enactments, to mitigate the evils of intemperance. During all that time, however, it has regarded intoxicating liquors as a legitimate article of commerce, and the legislation has been restrictive, rather than prohibitory. The sale and use of such liquors as a beverage has been regarded as an evil so enormous as to demand the exercise of the highest powers of the State for its suppression. At the same time, it has been recognized that the article had its legitimate uses. The object aimed at by the legislation has been the suppression of the traffic in the article for the use wherein it has been a continuous and crying evil, and to regulate and protect it for such uses as are beneficial, or at least not hurtful. The statute forbids the sale of such liquors for use as a beverage, and prescribes severe penalties for violations of its provisions; but it allows sales of the article for use

as a medicine, and in the arts, and for culinary and sacramental purposes, and prescribes certain limitations and restrictions upon the traffic for those uses.

In their scope and object, these statutes are not materially different from those which have been enacted for the restriction of the sale of poisons, and the regulation of the storage, handling, and use of explosives, and other articles dangerous to the lives or property of the people, or deleterious to society; and they were enacted in the exercise of the same power, viz., the police power of the State. That the State has the power to enact such legislation is not now a question of doubt, and that the legislature is the sole judge of the necessity for their enactment is equally clear. Laws having the same general objects in view have probably been enacted in every State in the Union, and their validity has seldom been questioned. The validity of these particular statutes has frequently been declared by this Court, and it has been adjudged by the highest tribunal in the nation that statutes having the same specific object are not in conflict with any provision of the Federal Constitution: *Mugler v. Kansas* (1887), 123 U. S. 623.

The statutes called in question in the *License Cases* (1847), 5 How. (46 U. S.) 504, were not essentially different in their object from those of this State. They were enacted for the purpose of mitigating, and to some extent suppressing, the evils of intemperance. The statute of Massachusetts prohibited the traffic in intoxicating liquors by all persons except those holding a license from the county commissioners, and licensed vendors were forbidden to sell in quantities less than twenty-eight gallons in any single sale. Under its provisions, no person was entitled, as matter of right, to receive a license but the question whether any licenses should be granted in the county was left entirely to the discretion of the commissioners. A person who did not hold a license, engaged in the business of selling foreign liquors, imported into the United States under the statutes thereof. He was indicted and convicted in the State courts of a violation of the statute of the State. The other cases were under similar statutes of the States of New Hampshire and Rhode Island, and involved similar states of fact. The causes being removed to the

Supreme Court, the judgments were affirmed. Subsequently the same claim of right was urged in these cases that is here alleged by the defendant, viz. : that as the liquors were transported into the States under the authority of the Federal Constitution and statutes, it was not competent for the States to prohibit their sale, or regulate the manner in which it should be conducted. But the Court held that the statutes were not in their operation in conflict with the commercial provisions of the federal Constitution. And it appears to us that this is necessarily so.

When the power of the State to legislate with reference to the subject matter is conceded, it follows, necessarily, we think, that all property within the State is subject to the regulations it has enacted. When property purchased in another State is transported to this State, and here delivered to the purchaser, to be used or consumed within the State, the transaction, in so far as it is governed by the provisions for the regulation of commerce among the States, is at an end. The sale and delivery are then consummated, and the property becomes at once subject to the laws which the State has enacted governing its use or disposition. It is true that some things are said by the Court in *Bowman v. Railway Co.* (1888), 125 U. S. 465, which appear to be in conflict with that view; but we do not understand that the question was involved or decided in that case. The sole question involved was as to the validity of certain provisions of the statute which forbade common carriers from transporting to any point within the State intoxicating liquors, unless they had been furnished with the written evidence of the right of the consignee to sell the same in the State. It is conceded that that subject is beyond the power of the State to legislate upon. But it by no means follows that the owner has the right, after the property has been delivered to him in the State, to use or dispose of it in a manner different from that prescribed by this State for the sale or use of such property generally.

It follows from these considerations that on defendant's appeal the judgment should be affirmed, while on plaintiff's appeal it will be reversed.

This case is printed here because *Leisy v. Hardin* was decided upon its authority: *infra*, page 490. It is also interesting as showing how much more accurate in his understanding of the law, was the Judge of the Superior Court (Hon. Henry Bank, Jr.) than the Supreme Court of the State, owing to the influence of the unreversed, though actually valueless *License Cases* of 1847. The test of an unbroken, original package, prevents one State from boycotting the products of other States, by declaring them not to be

articles of commerce or to be dangerous to the welfare of its citizens.

The precise point in respect to the boxed bottles of whiskey was not involved in the case which did reach the Supreme Court of the United States, and in that sense, remains undecided. But the decision of the Superior Court is so advantageous to the powers of the local authorities, and so completely accords with the principles of *Brown v. Maryland*, that it would be a serious task to ask its reversal.

Supreme Court of Iowa.

GRUSENDORF v. HOWAT.

The sale of an original package is subject to the laws of the State, as the Congressional powers over interstate commerce terminate upon the delivery of the package within the State.

Certiorari to the District Court of Clinton County.

W. C. Grohe and *P. B. Wolfe*, for the plaintiff.

Hon. *A. J. Baker*, Attorney General, for the defendant.

REED, C. J., February 7, 1889. The plaintiff was, in a proceeding, enjoined from carrying on the business of selling intoxicating liquors in a certain designated building in the City of Clinton. Afterwards a complaint was filed in the Court, charging him with a violation of the injunction. He was cited to appear before the Court and show cause why he should not be punished for contempt. On the trial, it was shown that he had, after the injunction, sold intoxicating liquors in the building named. In defense, he showed that the liquors sold by him were purchased in the State of Illinois, and were transported to him in this State by a common carrier, and that he sold the same in the packages in which they were when he purchased them, and in which they were transported to this State. The Court adjudged him to be in contempt, and entered judgment against him, imposing a fine and imprisonment. He thereupon sued out a writ of *certiorari* from this

Court, and in obedience to that mandate, the trial judge has certified the record of the proceeding to us. The judgment of the lower court is in accord with our holding in the foregoing case of *Collins v. Hills*.

The writ will therefore be dismissed.

The principle of this case is clearly not in accord with the law, as stated in *Brown v. Maryland* (*supra*, pages 439, 442), *Low v. Austin* (Id. 443, 444), *The Passenger Cases* (Id. 459, 462, 465), and the subsequent decisions of the Supreme Court of the United States. The first positive appearance of such doctrine was in *N. Y. v. Miln* (*supra*, pages 448, 450), and the strong root which has flourished from 1847, when the *License Cases* (*supra*,

pages 433, 456), were decided, has nourished many State decisions without the Courts perceiving the full effect of the principles laid down by Justice CURTIS, in *Cooley v. Port Wardens* (*supra*, pages 466, 470). Careful reading cannot but verify the statement of Chief Justice FULLER, (*infra*, page 507) that the authority of the New Hampshire License Case has been distinctly overthrown.

Supreme Court of Iowa.

LEISY *et al.* v. HARDIN.

The sale of liquors in the original packages in which they are brought from another State, may be prohibited under the police powers of the place of sale.

Appeal from the Superior Court of Keokuk County.

William B. Collins and *H. Scott Howell & Son*, for the appellants.

Anderson & Davis, for the appellee.

ROTHROCK, J., October 4, 1889. (After stating the facts substantially as on pages 490-2, *infra*.) We have stated the facts somewhat in detail for the purpose of demonstrating that they present the same question determined by this Court in the cases of *Collins v. Hills*, and in *Grusendorf v. Howat*, *supra*. Counsel for appellees concede, in argument, that the cases cited involve the same controlling question. It is true they claim that in this case there is the exception that the plaintiffs and appellees are citizens and residents of Illinois, and produce and manufacture their beer in that State, and sell it as manufacturers; but no claim is made, in argument, and we can discover no reason why the laws of this State, which for-

bid the sale of intoxicating liquors, are not applicable to all persons, no matter where they may abide. We adhere to the rule announced in the cited cases, and have no desire to further discuss or elaborate the questions involved.

The judgment of the Superior Court will be reversed.

The case was then removed to the Supreme Court of the United States, and there reversed : See next case.

Supreme Court of the United States.

LEISY *et al.* v. HARDIN.

The Constitutional power to regulate commerce between the States, has no other limits than those prescribed by the Constitution itself.

Interstate commerce, or the purchase, sale and exchange of commodities, requires a uniform system, and in the absence of Congressional action cannot be the subject of State laws.

State authority may be exercised over subjects of interstate commerce only when a general regulation is not necessary or convenient, and Congress has not acted.

The responsibility is upon Congress to permit State regulation of interstate traffic.

Merchandise brought from another State is under the Constitutional power exclusively, until it has been sold or disposed of so as to mingle with the common mass of property in the State into which it has been brought.

Liquor imported from another State for sale in the packages in which it has been shipped, cannot be seized under State laws, while in the possession of the consignee in the original packages, awaiting sale.

Ardent spirits, distilled liquors, ale and beer, are the subjects of exchange, barter and traffic ; that is, are subjects of commerce and not such articles as a State may subject to sanitary regulations, upon the plea of tending to spread disease, pestilence and pauperism.

In error to the Supreme Court of the State of Iowa.

Chief Justice FULLER stated the case thus:—

Christiana Leisy, Edward Leisy, Lena and Albert Leisy, composing the firm of Gus. Leisy & Co., citizens of Illinois, brought their action of replevin against A. J. Hardin, the duly elected and qualified Marshal of the City of Keokuk, Iowa, and, *ex officio*, Constable of Jackson Township, Lee county, Iowa, in the Superior Court of Keokuk, in said County, to recover 122 one-quarter barrels of beer, 171 one-eighth barrels of beer,

and 11 sealed cases of beer, which had been seized by him in a proceeding on behalf of the State of Iowa against said defendants, under certain provisions of the Code of the State of Iowa; and upon issue joined, a jury having been duly waived by the parties, the case was submitted to the Court for trial, and, having been tried, the Court, after having taken the case under advisement, finally rendered and filed in said cause its findings of fact and conclusions of law in words and figures following, to wit:

(1) That plaintiffs, Gus. Leisy & Co., are a firm of that name and style, residing in the State of Illinois, with principal place of business at Peoria, Ill.; that said firm is composed wholly of citizens of Illinois; that said firm is engaged as brewers in the manufacture of beer in the said city of Peoria, Ill., selling same in the States of Illinois and Iowa.

(2) That the property in question, to wit, 122 one-quarter barrels of beer, of the value of \$300, 171 one-eighth barrels of beer, value \$215, and 11 sealed cases of beer, value of \$25, was all manufactured by said Leisy & Co. in the city of Peoria, Ill., and put up in said kegs and cases by the manufacturers, viz., Gus. Leisy & Co., at Peoria, Ill.; that each of said kegs was sealed and had placed upon it, over the plug in the opening of each keg, a United States internal revenue stamp of the district in which Peoria is situated; that said cases were substantially made of wood, each one of them containing 24 quart bottles of beer, each bottle of beer corked, and the cork fastened in with a metallic cap, sealed and covered with tin foil, and each case was sealed with a metallic seal; that said beer in all of said kegs and cases was manufactured and put up into said kegs and cases as aforesaid by the manufacturers, to wit, Gus. Leisy & Co., plaintiffs in this suit, and to open said cases the metallic seals had to be broken.

(3) That the property herein described was transported by said Gus. Leisy & Co. from Peoria, Ill., by means of railways, to Keokuk, Iowa, in said sealed kegs and cases, as same was manufactured and put up by them in the city of Peoria, Ill.

(4) That said property was sold and offered for sale in Keokuk, Iowa, by John Leisy, a resident of Keokuk, Iowa, who is agent for said Gus. Leisy & Co.; that the only sales and offers to sell of said beer was in the original keg and sealed case as manufactured and put up by said Gus. Leisy & Co., and imported by them into the State of Iowa; that no kegs or cases sold or offered for sale were broken or opened on the premises; that as soon as same was purchased it was removed from the premises occupied by Gus. Leisy & Co., which said premises are owned by Christiana Leisy, a member of the firm of Gus. Leisy & Co., residing in and being a citizen of Peoria, Ill.; that none of such sales or offers to sell were made to minors or persons in the habit of becoming intoxicated.

(5) That on the 30th day of June, 1888, the defendant, as Constable of Jackson Township, Lee County, Iowa, by virtue of a search-warrant is-

sued by J. G. Garrettson, an acting Justice of the Peace of said Jackson Township, upon an information charging that in premises occupied by said John Leisy there were certain intoxicating liquors, etc., seized the property therein described, and took same into his custody.

(6) And the Court finds that said intoxicating liquors thus seized by the defendant in his official capacity as Constable were kept for sale in the premises described in the search-warrant in Keokuk, Lee County, Iowa, and occupied by Gus. Leisy & Co., for the purpose of being sold, in violation of the provisions of the laws of Iowa, but which laws, the Court holds, are unconstitutional and void, as herein stated.

(7) That on the 2d day of July, 1888, plaintiffs filed in this Court their petition, alleging, among other things, that they were the owners and entitled to the possession of said property, and that the law under which said warrant was issued was unconstitutional and void, being in violation of section 8 of article I of the Constitution of the United States, and having filed a proper bond a writ of replevin issued, and the possession of said property was given to plaintiffs.

From the foregoing facts the Court finds the following conclusions:

That plaintiffs are the sole and unqualified owners of said property, and entitled to the possession of the same, and judgment for \$1.00 damages for their detention, and costs of suit; that so much of chapter 6, tit. 11, Code 1873, and the amendments thereto, as prohibits such sales by plaintiffs, is unconstitutional, being in contravention of section 8 of article I of the Constitution of the United States; that said law has been held unconstitutional in a like case heretofore tried and determined by this Court, involving the same question, in the case of *Collins v. Hills*, decided prior to the commencement of this suit, and prior to the seizure of said property by defendant; to all of which the defendant at the time excepted.

Judgment was thereupon rendered as follows:

"This cause coming on for hearing, plaintiffs appearing by *Anderson & Davis*, their attorneys, and the defendant by *H. Scott Howell & Son* and *William B. Collins*, his attorneys, and the cause coming on for final hearing on the pleadings on file and the evidence introduced, the Court makes the special finding of facts and law herewith ordered to be made of record, and finds that plaintiffs are the sole and unqualified owners and entitled to possession of the following personal property, to wit: 122 one-quarter ($\frac{1}{4}$) barrels of beer, of the value of \$300.00; 171 one-eighth ($\frac{1}{8}$) barrels of beer, of the value of \$215.00; and eleven (11) sealed cases of beer, of the value of \$25.00.

That plaintiffs being in possession of said property by virtue of a bond heretofore given, said possession in plaintiffs is confirmed.

The Court further finds that the writ issued by J. G. Garrettson, a Justice of the Peace, under which defendant held possession of said property and seized same, is void, same having been issued under sections of the law of Iowa that are unconstitutional and void.

That plaintiff is entitled to one dollar damages for the wrongful detention of said property.

It is therefore ordered and considered by the Court that the plaintiffs have and recover of defendant one dollar damages, and costs of this action, taxed at \$——.

To which findings, order, and judgment of Court the defendant at the time excepts, and asks until the 31st day of October, 1888, to prepare and file his bill of exceptions, which request is granted, and order hereby made."

A motion for a new trial was made and overruled, and the cause taken to the Supreme Court of Iowa by appeal, and errors therein assigned as follows :

"(1) The Court erred in finding that the plaintiffs were the sole and unqualified owners, and were entitled to the possession of the intoxicating liquors seized and held by appellant.

(2) In finding that the plaintiffs were entitled to one dollar damages for their detention, and for costs of suit.

(3) The Court erred in holding that the sales of beer in 'original packages,' by the keg and case, as made by John Leisy, agent of plaintiffs, were lawful.

(4) The Court erred in its conclusions and finding that so much of the law of the State of Iowa embraced in chapter 6, tit. 11, Code 1873, and the amendments thereto, as prohibits such sales of beer in the State of Iowa, was unconstitutional, being in contravention of section 8, article I of the Constitution of the United States.

(5) The Court erred in rendering a judgment for plaintiffs, and awarding them the intoxicating liquors in question, and damages and costs against defendant.

(6) The Court erred in overruling the defendant's motion for a new trial."

The Supreme Court reversed the judgment of the Superior Court, and entered judgments against the plaintiffs and their sureties on the replevin bond in the amount of the value of the property, with costs. The judgment thus concluded :

And it is further certified by this Court, and hereby made a part of the record, that in the decision of this suit there is drawn in question the validity of certain statutes of the State of Iowa, namely, chapter 6 of title 11 of the Code of Iowa of 1873 and the amendments thereto, on the ground of their being repugnant to and in contravention of section 8 of article I of the Constitution of the United States, said appellees, Gus. Leisy & Co., claiming such statutes of the State of Iowa are invalid, and the decision in this cause is in favor of the validity of said statutes of the State of Iowa.

To review this judgment, a writ of error was sued out from this Court. The opinion of the Supreme Court, not yet reported in the official series, will be found [*Supra* page 490].

The seizure of the beer in question by the constable was made under the provisions of chapter 8, tit. 11, Code 1873, and amendments thereto: Code 1873, p. 279; Laws 1884, c. 8, p. 8; c. 143, p. 146; Laws 1888, c. 71, p. 91; 1 McClain, Ann. Code, §§ 2359-2431, p. 603.

Section 1523 of the Code is as follows :

"No person shall manufacture or sell, by himself, his clerk, steward, or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided. And the keeping of intoxicating liquor, with the intent on the part of the owner thereof, or any person acting under his authority, or by his permission, to sell the same within this State, contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided."

Chapter 71, Laws 22d Gen. Assembly, is an act approved April 12, 1888 (Laws of Iowa, 1888, p. 91), of which the first section is as follows :

"That after this act takes effect, no person shall manufacture for sale, sell, keep for sale, give away, exchange, barter, or dispense any intoxicating liquor, for any purpose whatever, otherwise than as provided in this act. Persons holding permits as herein provided shall be authorized to sell and dispense intoxicating liquors for pharmaceutical and medicinal purposes, and alcohol for specified chemical purposes, and wine for sacramental purposes, but for no other purposes whatever; and all permits must be procured as hereinafter provided from the district court of the proper county at any term thereof after this act takes effect, and a permit to buy and sell intoxicating liquors when so procured shall continue in force for one year from date of its issue, unless revoked according to law, or until application for renewal is disposed of, if such application is made before the year expires: provided, that renewals of permits may be annually granted upon written application by permit holders who show to the satisfaction of the court or judge that they have, during the preceding year, complied with the provisions of this act, and execute a new bond as in this act required to be originally given, but parties may appear and resist renewals the same as in applications for permits.

Section 2 provides for notice of application for permit, and section 3 reads thus:

Applications for permits shall be made by petition signed and sworn to by the applicant, and filed in the office of the clerk of the district court of the proper county at least ten days before the first day of the term; which petition shall state the applicant's name, place of residence, in what business he is then engaged, and in what business he has been engaged for two years previous to filing petition; the place, particularly describing

it, where the business of buying and selling liquor is to be conducted; that he is a citizen of the United States and of the State of Iowa; that he is a registered pharmacist, and now is, and for the last six months has been, lawfully conducting a pharmacy in the township or town wherein he proposes to sell intoxicating liquors under the permit applied for, and, as the proprietor of such pharmacy, that he has not been adjudged guilty of violating the law relating to intoxicating liquors within the last two years next preceding his application; and is not the keeper of a hotel, eating-house, saloon, restaurant, or place of public amusement; that he is not addicted to the use of intoxicating liquors as a beverage, and has not, within the last two years next preceding his application, been directly or indirectly engaged, employed, or interested in the unlawful manufacture, sale, or keeping for sale, of intoxicating liquors; and that he desires a permit to purchase, keep, and sell such liquors for lawful purposes only.

Various sections follow, relating to giving bond; petition as to the good moral character of applicant; hearing on the application; oath upon the issuing of permit; keeping of record; punishment by fine, imprisonment, etc.

By section 20, sections 1524, 1526, and other sections of the Code, were, in terms, repealed. The Code provided for the seizure of intoxicating liquors unlawfully offered for sale, and no question in reference to that arises here, if the law in controversy be valid.

By section 1, c. 8, Laws 1884, p. 8, ale, beer, wine, spirituous, vinous, and malt liquors are defined to be intoxicating liquors.

Section 1524, Code 1873, p. 279, was as follows:

Nothing in this chapter shall be construed to forbid the sale, by the importer thereof, of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors in accordance with such laws: provided, that the said liquor, at the time of said sale by said importer, remains in the original casks or packages in which it was by him imported, and in quantities not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages, and in said quantities only; and nothing contained in this law shall prevent any persons from manufacturing in this State liquors for the purpose of being sold according to the provisions of this chapter, to be used for mechanical, medicinal, culinary, or sacramental purposes.

This section is substantially identical with section 2 of chapter 45 of the Acts of the Fifth General Assembly of Iowa, approved January 22, 1855, (Laws Iowa 1854-55, p. 58) and it was carried into the revision of 1860 as section 1560 (Re-

vision 1860, c. 64, p. 259). It was repealed by section 20 of the act of April 12, 1888, as before stated.

Section 1553 of the Code, as amended by the act of April 5, 1886, (Laws Iowa 1886, p. 83,) forbade any common carrier to bring within the State of Iowa, for any person or persons or corporation, any intoxicating liquors from any other State or Territory of the United States, without first having been furnished with a certificate, under the seal of the county auditor of the county to which said liquor was to be transported, or was consigned for transportation, certifying that the consignee, or person to whom such liquor was to be transported, conveyed, or delivered, was authorized to sell intoxicating liquors in such county. This was held to be in contravention of the federal Constitution, in *Bowman v. Railway Co.*, (1888) 125 U. S. 465.

James C. Davis, for plaintiffs in error.

H. Scott Howell, Wm. B. Collins, and John Y. Stone, for defendant in error.

Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court, April 28, 1890.

The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered: *Gibbons v. Ogden*, (1824) 9 Wheat. (22 U. S.) 1; *Brown v. Maryland*, (1827) 12 Wheat. (25 U. S.) 419. And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of

the police power of the State, unless placed there by congressional action. *Henderson v. The Mayor*, (1876) 92 U. S. 259; *The Hannibal & St. Jo R. R. Co. v. Husen*, (1878) 95 U. S. 465; S.C. 17 AMERICAN LAW REGISTER, 164; *Walling v. Michigan* (1886), 116 U. S. 446; *Robbins v. Taxing Dist.*, (1887) 120 U. S. 489.

The power to regulate commerce among the States is a unit, but, if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by the States, except so far as falling within the scope of a power confided to the general government. Where the subject matter requires a uniform system, as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the subject-matter, different rules may be suitable for different localities, the States may exercise powers, which though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power: *Cooley v. Board of Wardens* (1851), 12 How. (53 U. S.) 299.

It was stated in the thirty-second number of the *Federalist* that the States might exercise concurrent and independent power in all cases but three: *First*, where the power was lodged exclusively in the federal Constitution; *second*, where it was given to the United States and prohibited to the States; *third*, where from the nature and subjects of the power, it must

be necessarily exercised by the national government exclusively. But it is easy to see that Congress may assert an authority, under one of the granted powers, which would exclude the exercise by the States upon the same subject of a different, but similar power, between which and that possessed by the general government no inherent repugnancy existed. Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exercised as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled: *County of Mobile v. Kimball* (1881), 102 U. S. 691; *Brown v. Houston* (1885), 114 U. S. 622, 631; *Railroad Co. v. Illinois* (1886), 118 U. S. 557; *Robbins v. Taxing Dist.* (1887), 120 U. S. 489, 493.

That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State? or when imported, prohibit their sale by the importer? If the importation can not be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control?

In *Brown v. Maryland*, *supra*, the act of the State Legisla-

ture drawn in question, was held invalid, as repugnant to the prohibition of the Constitution upon the States to lay any impost or duty upon imports or exports, and to the clause granting the power to regulate commerce; and it was laid down by the great magistrate who presided over this Court for more than a third of a century, that the point of time when the prohibition ceases, and the power of the State to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; that, as to the power to regulate commerce, none of the evils which proceeded from the feebleness of the federal government contributed more to the great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress; that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States; that that power was complete in itself, acknowledged no limitations other than those prescribed by the Constitution, was co-extensive with the subject on which it acts, and not to be stopped at the external boundary of a State, but must be capable of entering its interior; that the right to sell any article imported was an inseparable incident to the right to import it; and that the principles expounded in the case applied equally to importations from a sister State.

Manifestly this must be so, for the same public policy applied to commerce among the States as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other: Story, Const. § 1066. And although the precise question before us was not ruled in *Gibbons v. Ogden* and *Brown v. Maryland*, yet we think it was virtually involved and answered, and that this is demonstrated,

among other cases, in *Bowman v. Railway Co.* (1888), 125 U. S. 465.

In the latter case, section 1553 of the Code of the State of Iowa, as amended by chapter 66 of the Acts of the Twenty-first General Assembly in 1886, forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first being furnished with a certificate as prescribed, was declared invalid, because essentially a regulation of commerce among the States, and not sanctioned by the authority, express or implied, of Congress. The opinion of the court, delivered by Mr. Justice MATTHEWS, the concurring opinion of Mr. Justice FIELD, and the dissenting opinion by Mr. Justice HARLAN, on behalf of Mr. Chief Justice WAITE, Mr. Justice GRAY, and himself, discussed the question involved in all its phases; and while the determination of whether the right of transportation of an article of commerce from one State to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates was in terms reserved, yet the argument of the majority conducts irresistibly to that conclusion, and we think we cannot do better than repeat the grounds upon which the decision was made to rest.

It is there shown that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself; that this was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States; that the power to prevent embarrassing restrictions by any State was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it would be absurd to suppose that the transmission of the subjects of trade from the State of the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States. It is explained that, where State laws alleged to be regulations of commerce among the States have been sustained, they were laws which related to bridges or dams across

streams, wholly within the State, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one State to another is in its nature national, admitting of but one regulating power; and it was to guard against the possibility of commercial embarrassments which would result if one State could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the State, that the power of regulating commerce among the States was conferred upon the federal government.

"If in the present case," said Mr. Justice MATTHEWS, "the law of Iowa operated upon all merchandise sought to be brought from another State into its limits, there could be no doubt that it would be a regulation of commerce among the States;" and he concludes that this must be so, though it applied only to one class of articles of a particular kind. The legislation of Congress on the subject of interstate commerce by means of railroads, designed to remove trammels upon transportation between different States, and upon the subject of the transportation of passengers and merchandise (Rev. St. §§ 4252-4289, inclusive), including the transportation of nitroglycerine and other similar explosive substances, with the proviso that, as to them, "any state, territory, district, city, or town within the United States" should not be prevented by the language used "from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use, or consumption therein," is referred to as indicative of the intention of Congress that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by States in particular cases by the express permission of Congress.

It is said that the law in question was not an inspection law, the object of which "is to improve the quality of articles produced by the labor of a country, to fit them for exportation; or, it may be for domestic use" (*Gibbons v. Ogden* (1824), 9 Wheat (22 U. S.) 1,203; *Turner v. Maryland* (1883), 107 U.

S. 38, 55); nor could it be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of the community; nor a law to prevent the introduction into the State of diseases, contagious, infectious, or otherwise.

Articles in such a condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered a regulation of commerce, prohibited by the Constitution; and the observations of Mr. Justice CATRON in the *License Cases* (1847), 5 How. (46 U.S.) 504, 599, are quoted to the effect that what does not belong to commerce is within the jurisdiction of the police power of the State, but that which does belong to commerce is within the jurisdiction of the United States; that to extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the State to bring within the police power "any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the products of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed-extravagance in food and clothing." And Mr. Justice MATTHEWS thus proceeds:

"For the purpose of protecting its people against the evils of intemperance, it has the right to prohibit the manufacture within its limits of intoxicating liquors. It may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries. It may punish those who sell them in violation of its laws. It may adopt any measures tending, even indirectly and remotely, to make the policy effective, until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union, in order to effect its end, however desirable such a regulation might be. * * * Can it be supposed that, by omitting any express declaration on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not

be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured, or sold in any State, and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States."

Many of the cases bearing upon the subject are cited and considered in these opinions, and among others, the *License Cases* (1847), 5 How. (46 U. S.) 504, wherein laws passed by Massachusetts, New Hampshire, and Rhode Island, in reference to the sale of spirituous liquors, came under review, and were sustained, although the members of the court who participated in the decisions did not concur in any common ground upon which to rest them.

That of *Peirce v. New Hampshire* is perhaps the most important to be referred to here. In that case, the defendants had been fined for selling a barrel of gin in New Hampshire which they had bought in Boston, and brought coastwise to Portsmouth, and there sold in the same barrel, and in the same condition in which it was purchased in Massachusetts, but contrary to the law of New Hampshire in that behalf. The conclusion of the opinion of Mr. Chief Justice TANEY is in these words :

"Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one; for, although the gin sold was an import from another State, and Congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as

it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue."

Referring to the cases of Massachusetts and Rhode Island, the Chief Justice, after saying that if the laws of those States came in collision with the laws of Congress authorizing the importation of spirits and distilled liquors, it would be the duty of the Court to declare them void, thus continues:

"It has, indeed, been suggested that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice, and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, or pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded; and may therefore admit or not, as it shall deem best, the importation of ardent spirits. And, inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction. * * * These State laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But, although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

The New Hampshire case, the Chief Justice observed, differs from *Brown v. Maryland*, in that the latter was a case arising out of commerce with foreign nations, which Congress had

regulated by law ; whereas, the case in hand was one of commerce between two States, in relation to which Congress had not exercised its power :

" But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation. The question, therefore, brought up for decision is whether a State is prohibited by the Constitution of the United States from making any regulations of foreign commerce or of commerce with another State, although such regulation is confined to its own territory and made for its own convenience or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States, and renders all State laws upon the subject null and void."

He declares it to appear to him very clear—

" That the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory ; and such regulations are valid unless they come in conflict with a law of Congress."

He comments on the omission of any prohibition in terms and concludes that if, as he thinks—

" The framers of the Constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the States, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of Congress, in cases of collision with State laws, is secured in the article which declares that the laws of Congress, passed in pursuance of the powers granted, shall be the supreme law ; and it is only where both governments may legislate on the same subject that this article can operate."

And he considers that the legislation of Congress and the States has conformed to this construction from the foundation of the government, as exemplified in State laws in relation to pilots and pilotage, and health and quarantine laws.

But, conceding the weight properly to be ascribed to the judicial utterances of this eminent jurist, we are constrained

to say that the distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids, rather than regulations, does not appear to us to have been sufficiently recognized by him in arriving at the conclusions announced. That distinction has been settled by repeated decisions of this Court, and can no longer be regarded as open to re-examination. After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the States and the exercise of power over purely local commerce and local concerns. The authority of *Pierce v. New Hampshire*, in so far as it rests on the view that the law of New Hampshire was valid because Congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to.

The doctrine now firmly established is, as stated by Mr. Justice FIELD, in *Bowman v. Railway Co.* (1888) 125 U. S. 507—

“That where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it, and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed, and the property imported is mingled with and becomes a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled.”

The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power

without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. Illustrations exemplifying the general rule are numerous. Thus we have held the following to be regulations of interstate commerce: A tax upon freight transported from State to State, *Case of the State Freight Tax*, (1873) 15 Wall. (82 U. S.) 232; a statute imposing a burdensome condition on ship-masters as a prerequisite to the landing of passengers, *Henderson v. Mayor, etc.* (1876), 92 U. S. 259; a statute prohibiting the driving or conveying of any Texas, Mexican, or Indian cattle, whether sound or diseased, into the State between the 1st day of March and the 1st day of November in each year, *Railroad Co. v. Husen*, (1878) 95 U. S. 465; a statute requiring every auctioneer to collect and pay into the State treasury, a tax on his sales, when applied to imported goods in the original packages by him sold for the importer, *Cook v. Pennsylvania*, (1878) 97 U. S. 566; a statute intended to regulate or tax, or to impose any other restriction upon, the transmission of persons or property, or telegraphic messages, from one State to another, *Railway Co. v. Illinois*, (1886) 118 U. S. 557; a statute levying a tax upon non-resident drummers offering for sale or selling goods, wares, or merchandise by sample, manufactured or belonging to citizens of other States, *Robbins v. Taxing Dist.*, (1887) 120 U. S. 489.

On the other hand we have decided in, *County of Mobile v. Kimball*, (1881) 102 U. S. 691, that a State statute providing for the improvement of the river, bay, and harbor of Mobile, since what was authorized to be done was only as a mere aid to commerce, was, in the absence of action by Congress, not in conflict with the Constitution; in *Escanaba Co. v. Chicago*, (1883) 107 U. S. 678, that the State of Illinois could lawfully authorize the City of Chicago to deepen, widen, and change the channel of, and construct bridges over, the Chicago river; in *Transportation Co. v. Parkersburg*, (1883) 107 U. S. 691, that the jurisdiction and control of wharves properly belong to the States in which they are situated, unless otherwise

provided; in *Brown v. Houston* (1885), 114 U. S. 622, that a general state tax laid alike upon all property, is not unconstitutional, because it happens to fall upon goods which, though not then intended for exportation, are subsequently exported; in *Morgan's S. S. Co. v. Board of Health*, (1886) 118 U. S. 455, that a state law requiring each vessel passing a quarantine station to pay a fee for examination as to her sanitary condition, and the ports from which she came, was a rightful exercise of police power; in *Smith v. Alabama*, (1888) 124 U. S. 465, and in *Railway Co. v. Alabama*, (1888) 128 U. S. 96, that a statute requiring locomotive engineers to be examined and obtain a license was not in its nature a regulation of commerce; and in *Kimmish v. Call*, (1889) 129 U. S. 217, that a statute providing that a person having in his possession Texas cattle, which had not been wintered north of the southern boundary of Missouri at least one winter, shall be liable for any damages which may accrue from allowing them to run at large, and thereby spread the disease known as the Texas fever, was constitutional.

We held also in *Welton v. State*, (1876) 91 U. S. 275, that a State statute requiring the payment of a license tax from persons dealing in goods, wares, and merchandise, which are not the growth, product, or manufacture of the State, by going from place to place to sell the same in the State, and requiring no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the State, is an unconstitutional regulation; and to the same effect in *Walling v. Michigan*, (1886) 116 U. S. 446, in relation to a tax upon non-resident sellers of intoxicating liquors to be shipped into a State from places without it. But it was held in *Patterson v. Kentucky*, (1879) 97 U. S. 501, and in *Webber v. Virginia*, (1881) 103 U. S. 344, that the right conferred by the patent laws of the United States did not remove the tangible property in which an invention might take form in the operation of the laws of the State, nor restrict the power of the latter to protect the community from the direct danger inherent in particular articles.

In *Mugler v. Kansas* (1887), 123 U. S. 623, it was adjudged that—

“ State legislation which prohibits the manufacture of spiritous, vinous,

fermented, or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, or by the Amendments thereto."

And this was in accordance with our decisions in *Bartemeyer v. Iowa*, (1874) 18 Wall. (85 U.S.) 129; *Beer Co. v. Massachusetts*, (1878) 97 U.S. 25; and *Foster v. Kansas*, (1884) 112 U.S. 201. So in *Kidd v. Pearson*, (1888) 128 U.S. 1, it was held that a State statute which provided (1) that foreign intoxicating liquors may be imported into the State, and there kept for sale by the importer, in the original packages, or for transportation in such packages and sale beyond the limits of the State, and (2) that intoxicating liquors may be manufactured and sold within the State for mechanical, medicinal, culinary, and sacramental purposes, but for no other, not even for the purpose of transportation beyond the limits of the State, was not an undertaking to regulate commerce among the States. And in *Eilenbecker v. District Court* (1890), 134 U.S. 31, we affirmed the judgment of the supreme court of Iowa, sustaining the sentence of the district court of Plymouth, in that State, imposing a fine of \$500 and costs and imprisonment in jail for three months, if the fine was not paid within 30 days, as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining the defendant from selling or keeping for sale any intoxicating liquors, including ale, wine, and beer, in Plymouth county. Mr. Justice MILLER there remarked:

"If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic: and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of a court to prevent the evil, as to punish the offense as a crime after it has been committed."

These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing

which they exercise powers not surrendered to the national government: but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity, or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void.

In *Mugler v. Kansas*, *supra*, the Court said that it could not—

"Shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil."

And that—

"If in the judgment of the legislature [of a State] the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. * * * Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."

Undoubtedly it is for the legislative branch of the State governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measure a State may properly adopt as appropriate or needful for the protection of the public morals, the public health, or the public safety; but, notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of

trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

Prior to 1888, the statutes of Iowa permitted the sale of foreign liquors imported under the laws of the United States, provided the sale was by the importer in the original casks or packages, and in quantities not less than those in which they were required to be imported; and the provisions of the statute to this effect were declared by the Supreme Court of Iowa in *Pearson v. Distillery* (1887), 72 Iowa, 354, to be—

“Intended to conform the statute to the doctrine of the United States Supreme Court, announced in *Brown v. Maryland* (1827), 12 Wheat. (25 U. S.) 419, and *License Cases* (1847), 5 How. (46 U. S.) 504, so that the statute should not conflict with the laws and authority of the United States.”

But that provision of the statute was repealed in 1888, and the law so far amended that we understand it now to provide that, whether imported or not, wine cannot be sold in Iowa except for sacramental purposes, nor alcohol except for specified chemical purposes, nor intoxicating liquors, including ale and beer, except for pharmaceutical and medicinal purposes, and not at all, except by citizens of the State of Iowa, who are registered pharmacists, and have permits obtained as prescribed by the statute, a permit being also grantable to one discreet person in any township where a pharmacist does not obtain it.

The plaintiffs in error are citizens of Illinois, and not pharmacists, and have no permit, but import into Iowa beer which they sell in original packages, as described. Under our decision in *Bowman v. Railway Co.*, *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that, in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer.

Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the State legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create. Undoubtedly there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accomodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice JOHNSON in *Gibbons v. Ogden* (1824), 9 Wheat. (22 U. S.) 1,238, in "a frank and candid co-operation for the general good." The legislation in question is to the extent indicated, repugnant to the Third Clause of Section Eight, Article One, of the Constitution of the United States, and therefore the judgment of the Supreme Court of Iowa is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

GRAY, J. Mr. Justice HARLAN, Mr. Justice BREWER, and myself are unable to concur in this judgment. As our dissent is based on the previous decisions of this Court, the respect due to our associates, as well as to our predecessors, induces us to state our position, as far as possible, in the words in which the law has been heretofore declared from this bench.

The facts of the case, and the substance of the statutes

whose validity is drawn in question, may be briefly stated. It was an action of replevin of sundry kegs and cases of beer, begun in an inferior court of the State of Iowa against a constable of Lee County, in Iowa, who had seized them at Keokuk, in that County, under a search-warrant issued by a Justice of the Peace, pursuant to the statutes of Iowa, which prohibit the sale, the keeping for sale, or the manufacture for sale, of any intoxicating liquor (including malt liquor) for any purpose whatever, except for pharmaceutical, medicinal, chemical, or sacramental purposes, and under an annual license granted by the district court of the proper county, upon being satisfied that the applicant is a citizen of the United States and of the State of Iowa, and a resident of the county, and otherwise qualified.

The plaintiffs were citizens and residents of the State of Illinois, engaged as brewers in manufacturing beer at Peoria, in that State, and in selling it in the States of Illinois and Iowa. The beer in question was manufactured by them at Peoria, and there put up by them in said kegs and cases; each keg being sealed, and having upon it, over the plug at the opening, a United States internal revenue stamp; and each case being substantially made of wood, containing two dozen quart bottles of beer, and sealed with a metallic seal, which had to be broken in order to open the case. The kegs and cases owned by the plaintiffs, and so sealed, were transported by them from Peoria by railway to Keokuk, and there sold and offered for sale by their agent, in a building owned by one of them, and without breaking or opening the kegs or cases.

The Supreme Court of Iowa having given judgment for the defendant, the question presented by this writ of error is whether the statutes of Iowa, as applied to these facts, contravene Section Eight of Article One, or Section Two of Article Four of the Constitution of the United States, or Section One of Article Fourteen of the Amendments to the Constitution.

By Section Eight of Article One of the Constitution—

"The Congress shall have power," among other things, "to regulate commerce with foreign nations, and among the several States," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

By Section Two of Article Four—

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

By Section One of the Fourteenth Amendment—

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By the Tenth Amendment—

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

Among the powers thus reserved to the several States, is what is commonly called the "police power,"—that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the State against disorder, disease, poverty, and crime.

"The police power belonging to the States in virtue of their general sovereignty," said Mr. Justice STORY, delivering the judgment of this Court, "extends over all subjects within the territorial limits of the States, and has never been conceded to the United States." *Prigg v. Pennsylvania* (1842), 16 Pet. (41 U. S.) 539, 625.

This is well illustrated by the recent adjudications, that a statute, prohibiting the sale of illuminating oils below a certain fire test, is beyond the constitutional power of Congress to enact, except so far as it has effect within the United States (as, for instance, in the District of Columbia) and without the limits of any State; but that it is within the constitutional power of a State to pass such a statute, even as to oils manufactured under letters patent from the United States: *U. S. v. DeWitt* (1869), 9 Wall. (76 U. S.) 41; *Patterson v. Kentucky* (1878), 97 U. S. 501.

The police power includes all measures for the protection of the life, the health, the property, and the welfare of the inhabitants, and for the promotion of good order and the public morals. It covers the suppression of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling-houses and lottery tickets:

Slaughter-House Cases (1872), 16 Wall. (84 U. S.) 36, 62, 87; *Fertilising Co. v. Hyde Park* (1877), 97 U. S. 659; *Phalen v. Virginia* (1850), 8 How. (49 U. S.) 163, 168; *Stone v. Mississippi* (1879), 101 U. S. 814.

This power being essential to the maintenance of the authority of local government, and to the safety and welfare of the people, is inalienable. As was said by Chief Justice WARRE, referring to earlier decisions to the same effect:—

“No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.” *Stone v. Mississippi* (1879), 101 U. S. 814, 819.

See, also, *Butchers' Union, etc., Co. v. Crescent City, etc., Co.* (1884), 111 U. S. 746, 753; *New Orleans Gas Co. v. Louisiana Light Co.* (1885), 115 U. S. 650, 672; *New Orleans v. Houston* (1886), 119 U. S. 265, 275.

The police power extends not only to things intrinsically dangerous to the public health, such as infected rags or diseased meat, but to things which, when used in a lawful manner, are subjects of property and commerce, and yet may be used so as to be injurious or dangerous to the life, the health, or the morals of the people. Gunpowder, for instance, is a subject of commerce, and of lawful use; yet, because of its explosive and dangerous quality, all admit that the State may regulate its keeping and sale. And there is no article, the right of the State to control or prohibit the sale or manufacture of which within its limits, is better established than intoxicating liquors: *License Cases* (1847), 5 How. (46 U. S.) 504; *Downham v. Alexandria Council* (1869), 10 Wall. (77 U. S.) 173; *Bartemeyer v. Iowa* (1873), 18 Wall. (85 U. S.) 129; *Beer Co. v. Massachusetts* (1877), 97 U. S. 25; *Tiernan v. Rinker* (1880), 102 Id. 123; *Foster v. Kansas* (1884), 112 U. S. 201; *Mugler v. Kansas* and *Kansas v. Ziebold* (1887), 123 Id. 623; *Kidd v. Pearson* (1888), 128 U. S. 1; *Eilenbecker v. District Court* (1890), 134 U. S. 31.

In *Beer Co. v. Massachusetts* above cited, this Court affirming the judgment of the Supreme Judicial Court of Massachusetts, reported in 115 Mass. 153, held that a statute of the State, prohibiting the manufacture and sale of intoxicating liquors, including malt liquors, except as therein provided, applied to a corporation which the State had long before chartered, and authorized to hold real and personal property, for the purpose of manufacturing malt liquors. Among the reasons assigned by this Court for its judgment were the following:—

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. Since we have already held, in the case of *Bartemeyer v. Iowa*, that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case than can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts:" (97 U. S. 32,33).

In *Mugler v. Kansas* and *Kansas v. Ziebold*, above cited, a statute of Kansas, prohibiting the manufacture or sale of intoxicating liquors as a beverage, and declaring all places where such liquors were manufactured or sold in violation of the statute to be common nuisances, and prohibiting their future use for the purpose, was held to be a valid exercise of the police power of the State, even as applied to persons who, long before the passage of the statute, had constructed buildings specially adapted to such manufacture. It has also been adjudged that neither the grant of a license to sell intoxicating liquors, nor the payment of a tax on such

liquors under the internal revenue laws of the United States, affords any defense to an indictment by a State for selling the same liquors contrary to its statutes: *License Tax Cases* (1866), 5 Wall. (72 U. S.) 462; *Peryear v. Com.* (1866), *Id.* 475.

The clause of the Constitution, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," has no bearing upon this case. The privileges and immunities thus secured are those fundamental rights and privileges which appertain to citizenship: *Conner v. Elliott* (1855), 18 How. (59 U. S.) 591, 593; CURTIS, J., in *Scott v. Sanford* (1856), 19 How. (60 U. S.) 393, 580; *Paul v. Virginia* (1868), 8 Wall. (75 U. S.) 168, 180; *McCready v. Virginia* (1876), 94 U. S. 391, 395. As observed by the Court in *Bartemeyer v. Iowa*":—

"The right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States:" (18 Wall. 133).

Nor is the case affected by the Fourteenth Amendment of the Constitution. As was said in the unanimous opinion of this Court in *Barbier v. Connolly*, after stating the true scope of that Amendment:—

"But neither the Amendment,—broad and comprehensive as it is,—nor any other Amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity:" (113 U. S. 27, 31).

Upon that ground, the Amendment has been adjudged not to apply to a State statute prohibiting the sale or manufacture of intoxicating liquors in buildings long before constructed for the purpose, or the sale of oleomargarine lawfully manufactured before the passage of the statute: *Mugler v. Kansas* (1887), 123 U. S. 623, 663; *Powell v. Pennsylvania* (1887), 127 U. S. 678, 683, 687.

The remaining and the principal question is whether the statutes of Iowa, as applied to the sale within that State of intoxicating liquors in the same cases or kegs, unbroken and unopened, in which they were brought by the seller from another State, is repugnant to the clause of the Constitution granting

to Congress the power to regulate commerce with foreign nations and among the several States.

In the great and leading case of *Gibbons v. Ogden* (1824), 9 Wheat. (22 U. S.) 1, the point decided was that acts of the Legislature of New York, granting to certain persons for a term of years the exclusive navigation by steamboats of all waters within the jurisdiction of the State, were, so far as they affected such navigation by vessels of other persons licensed under the laws of the United States, repugnant to the clause of the Constitution empowering Congress to regulate foreign and interstate commerce. Chief Justice MARSHALL, in delivering judgment, after speaking of the inspection laws of the States, and observing that they had a remote and considerable influence on commerce, but that the power to pass them was not derived from a power to regulate commerce, said :—

“They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government,—all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress ; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes ; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given :” (Pages 203, 204).

Again, he said that quarantine and health laws “are considered as flowing from the acknowledged power of a State to provide for the health of its citizens,” and that the constitutionality of such laws had never been denied : (Page 205).

Mr. Justice JOHNSON, in his concurring opinion, said :—

“It is no objection to the existence of distinct, substantive powers that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship that may be the subject of commercial regulation may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action, and, while frankly exercised, they can produce no serious collision :” (Page 235).

That Chief Justice MARSHALL, and his associates did not consider the constitutional grant of power to Congress to regulate foreign and interstate commerce, as, of its own force, and without national legislation, impairing the police power of each State within its own borders to protect the health and welfare of its inhabitants, is clearly indicated in the passages above quoted from the opinions in *Gibbons v. Ogden*, and is conclusively proved by the unanimous judgment of the Court delivered by the Chief Justice, five years later, in *Willson v. Marsh Co.* (1829), 2 Pet. (27 U. S.) 245. In that case, the Legislature of Delaware had authorized a dam to be erected across a navigable tide-water creek which opened into Delaware bay, thereby obstructing the navigation of the creek by a vessel enrolled and licensed under the navigation laws of the United States. The decision in *Gibbons v. Ogden* was cited by counsel as conclusive against the validity of the statute of the State. But its validity was upheld by the Court, for the following reasons :—

“The act of assembly, by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep, level marsh adjoining the Delaware, up which the tide flows some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insists that it comes in conflict with the power of the United States ‘to regulate commerce with foreign nations and among the several States.’ If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States,—we should feel not much difficulty in saying that a State law coming in conflict with such act, would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States,—a power which has not been so exercised as to affect the question. We do not think that

the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject:" (2 Pet. 251, 252).

In *Brown v. Maryland* (1827), 12 Wheat. (25 U. S.) 419, the point decided was that an act of the Legislature of Maryland, requiring all importers of foreign goods by the bale or package, or of spirituous liquors, and "other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce," to first take out a license and pay \$50 for it, and imposing a penalty for failure to do so, was, as applied to sales by an importer of foreign liquors in the original packages, unconstitutional, both as laying an impost, and as repugnant to the power of Congress to regulate foreign commerce. The statute there in question was evidently enacted to raise revenue from importers of foreign goods of every description, and was not an exercise of the police power of the State. And Chief Justice MARSHALL, in answering an argument of counsel, expressly admitted that the power to direct the removal of gunpowder, or the removal or destruction of infectious or unsound articles which endanger the public health, "is a branch of the police power, which unquestionably remains and ought to remain with the States:" (Pages 443, 444). Moreover, the question there presented and decided concerned foreign commerce only, and not commerce among the States. Chief Justice MARSHALL, at the outset of his opinion so defined it, saying:—

"The cause depends entirely on the question whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported:" (Page 436).

It is true that, after discussing and deciding that question, he threw out this brief remark:—

"It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State:" (Page 449).

But this remark was *obiter dictum*, wholly aside from the question before the Court, and having no bearing on its decision, and therefore extra-judicial, as has since been noted by

Chief Justice TANEY and Mr. Justice McLEAN in the *License Cases* (1847), 5 How. (46 U. S.) 504, 575, 578, 594; and by Mr. Justice MILLER in *Woodruff v. Parham* (1869), 8 Wall. (75 U. S.) 123, 139. To a remark made under such circumstances, are peculiarly applicable the warning words of Chief Justice MARSHALL himself in an earlier case, where, having occasion to explain away some *dicta* of his own in delivering judgment in *Marbury v. Madison* (1803), 1 Cranch. (5 U. S.) 137, he said:—

“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated: *Cohens v. Virginia* (1821), 6 Wheat. (19 U. S.) 264, 399, 400.”

Another striking instance in which that maxim has been applied and acted on, is to be found in the opinion of the Court at the present term in *Hans v. Louisiana* (1890), 134 U. S. 1, 20.

But the unanimous judgment of this court in 1847, in *Peirce v. New Hampshire*, reported together with *Thurlow v. Massachusetts* and *Fletcher v. Rhode Island* as the *License Cases* (1847), 5 How. (46 U. S.) 504, is directly in point, and appears to us conclusively to govern the case at bar. Those cases were elaborately argued by eminent counsel, and deliberately considered by the Court, and Chief Justice TANEY, as well as each of six associate Justices, stated his reasons for concurring in the judgment. The cases from Massachusetts and Rhode Island arose under statutes of either State prohibiting sales of spirituous liquors by any person, in less than certain quantities, without first having obtained an annual license from municipal officers,—in the one case from county commissioners, who by the express terms of the statute were not required to grant any licenses when in their opinion the public good did not require them to be granted; and in the other case, from a town council, who were forbidden to grant licenses

whenever the voters of the town in town-meeting decided that none should be granted: Rev. St. Mass. 1836, c. 47, §§ 3, 17, 23-25; St. 1837, c. 242, § 2; Pub. Laws R. I. 1844, p. 496, § 4; Laws 1845, p. 72; 5 How. (46 U. S.) 506-510, 540. Those statutes were held to be constitutional, as applied to foreign liquors which had passed out of the hands of the importer; while it was assumed that, under the decision in *Brown v. Maryland*, those statutes could be allowed no effect as to such liquors while they remained in the hands of the importer in the original packages upon which duties had been paid to the United States: 5 How. (46 U. S.) 576, 590, 610, 618.

The case of *Peirce v. New Hampshire* directly involved the validity, as applied to liquors brought in from another State, of a statute of New Hampshire, which imposed a penalty on any person selling any wine, rum, gin, brandy, or other spirits, in any quantity, "without license from the selectmen of the town or place where such person resides:" Laws N. H. 1838, c. 369; 5 How. 555. The plaintiffs in error, having been indicted under that statute for selling to one Aaron Sias, in the town of Dover, in the State of New Hampshire, one barrel of gin without license from the selectmen of the town, at the trial admitted that they so sold to him a barrel of American gin; and introduced evidence that the barrel of gin was purchased by the defendants in Boston, in the Commonwealth of Massachusetts, brought coastwise to the landing at Piscataqua bridge, and from thence to the defendants' store in Dover, and afterwards sold to Sias in the same barrel and in the same condition in which it was purchased in Massachusetts. The defendants contended that the statute was unconstitutional, because it was "in violation of certain public treaties of the United States with Holland, France and other countries, containing stipulations for the admission of spirits into the United States;" and because it was repugnant to the clauses of the Constitution of the United States, restricting the power of the States to lay duties on imports or exports, and granting the power to Congress to regulate commerce with foreign nations and among the several States. Chief Justice PARKER instructed the jury—

"That this State could not regulate commerce between this and other States; that this State could not prohibit the introduction of articles from another State with such a view, nor prohibit a sale of them with such a purpose; but that, although the State could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries, or from other States; that she might tax them the same as other property, and might regulate the sale to some extent; that a State might pass health and police laws, which would, to a certain extent, affect foreign commerce, and commerce between the States; and that this statute was a regulation of that character, and constitutional."

After a verdict of guilty, exceptions to this instruction were overruled by the highest court of the State: 5 How. (46 U. S.) 554-557; 13 N. H. 536. In that case, as in the case at bar, the statute of the State prohibited sales of intoxicating liquors by any person without a license from municipal authorities, and authorized licenses to be granted only to persons residing within the State; and the liquors were sold within the State by the importer, and in the same barrel, keg, or case, unbroken and in the same condition in which he had brought them from another State. Yet the judgment of the highest Court of New Hampshire was unanimously affirmed by this Court. Chief Justice TANEY, Mr. Justice CATRON, and Mr. Justice NELSON were of opinion that the statute of New Hampshire was a regulation of interstate commerce, but yet valid, so long as it was not in conflict with any act of Congress. Chief Justice TANEY, after recognizing that:—

"Spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists; and Congress, under its general power to regulate Commerce with foreign nations, may prescribe what articles of merchandise shall be admitted and what excluded, and may therefore admit or not, as it shall deem best, the importation of ardent spirits; and, inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction."

And yet upholding the validity of the statutes of Massachusetts and Rhode Island, as not interfering with the trade in ardent spirits while they remained a part of foreign commerce, and were in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorized them to be imported (page 577), proceeded to state the case from New Hampshire as follows:—

"The present case, however, differs from *Brown v. Maryland* in this: that the former was one arising out of commerce with foreign nations, which Congress had regulated by law; whereas, the present is a case of commerce between two States, in relation to which Congress has not exercised its power. Some acts of Congress have, indeed, been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one State to another. This case differs also from the cases of *Massachusetts* and *Rhode Island*; because, in these two cases, the laws of the States operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of Congress. But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation:" (Page 578).

And he concluded his opinion thus:—

"Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one; for, although the gin sold was an import from another State, and Congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue." (Page 586).

Mr. Justice CATRON expressed similar views. While he was of opinion that the ultimate right of determining what commodities might be lawful subjects of interstate commerce belonged to Congress in the exercise of its power to regulate commerce, and not to the States in the exercise of the police power, he was equally clear that the statute of New Hampshire was a valid regulation, in the absence of any legislation upon the subject by Congress. After pointing out the difficulties standing in the way of any attempt by Congress to make the special and various regulations required at different places at the maritime or inland borders of the States, he said:

"I admit that this condition of things does not settle the question of contested power; but it satisfactorily shows that Congress cannot do what the States have done, are doing, and must continue to do, from a controlling necessity, even should the exclusive power in Congress be maintained by our decision:" (Page 606). "Congress has stood by for nearly sixty years, and seen the States regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objec-

tion ; and for this Court now to decide that the power did not exist in the States, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of State legislation on the particular subject. We would by our decision expunge more State laws and city corporate regulations than Congress is likely to make in a century on the same subject ; and on no better assumption than that Congress and the State legislatures had been altogether mistaken as to their respective powers for fifty years and more. If long usage, general acquiescence, and the absence of complaint, can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the Courts : " (Page 607).

And finally, in summing up his conclusions, he said :—

"That the law of New Hampshire was a regulation of commerce among the States in regard to the article for selling of which the defendants were indicted and convicted ; but that the State law was constitutionally passed, because of the power of the State thus to regulate ; there being no regulation of Congress, special or general, in existence, to which the State law was repugnant : " (Pages 608, 609).

Mr. Justice NELSON expressed his concurrence in the opinions delivered by the Chief Justice and Mr. Justice CATRON : (Page 618). Justices McLEAN, DANIEL, WOODBURY and GRIER, on the other hand, were of opinion that the license laws of New Hampshire, as well as those of Massachusetts and Rhode Island, were merely police regulations, and not regulations of commerce, although they might incidentally affect commerce. Mr. Justice McLEAN, in the course of his opinion in *Thurlow v. Massachusetts*, said :—

"The license acts of Massachusetts do not purport to be a regulation of commerce. They are essentially police laws. Enactments similar in principle are common to all the States. Since the adoption of its Constitution they have existed in Massachusetts : " (Page 588). [St. Mass. 1786, c. 68 ; 1792, c. 25 ; 7 Dane, Abr. 43, 44] "It is the settled construction of every regulation of commerce that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or anything which contaminates its morals, or endangers its safety. And this is an acknowledged principle applicable to all general regulations. Individuals in the enjoyment of their own rights must be careful not to injure the rights of others. From the explosive nature of gunpowder, a city may exclude it. Now, this is an article of commerce, and is not known to carry infectious disease ; yet, to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of com-

merce, but acts of self-preservation. And, though they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the State :'' (Pages 589, 590). "A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the State authority. The State may regulate the sale of foreign spirits, and such regulation is valid, though it reduce the quantity of spirits consumed. This is admitted. And how can this discretion be controlled? The powers of the General Government do not extend to it. It is in every respect a local regulation, and relates exclusively to the internal police of the State :'' (Page 591). "The police power of a State and the foreign commercial power of Congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments :'' (Page 592).

In his opinion in *Peirce v. New Hampshire*, he declared that the same views were equally applicable to that case, and added :—

"The tax in the form of a license, as here presented, counteracts no policy of the Federal Government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the State. The license system is a police regulation, and, as modified in the State of New Hampshire, was designed to restrain and prevent immoral indulgences, and to advance the moral and physical welfare of society. If this tax had been laid on the property as an import into the State, the law would have been repugnant to the Constitution. It would have been a regulation of commerce among the States, which has been exclusively given to Congress. But this barrel of gin, like all other property within the State of New Hampshire, was liable to taxation by the State. It comes under the general regulation, and cannot be sold without a license. The right of an importer of ardent spirits to sell in the cask without a license, does not attach to the plaintiffs in error, on account of their having transported this property from Massachusetts to New Hampshire :'' (Pages 595, 596).

Mr. Justice DANIEL said :—

"The license laws of Massachusetts, Rhode Island, and New Hampshire, now under review, impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular commodity may be circulated within the respective jurisdictions of those States, vesting in their domestic tribunals a discretion in selecting the agents for such circulation, without discriminating between the sources whence commodities may have been derived. They do not restrict importation to any extent ; they do not interfere with it, either in appearance or reality ; they do not prohibit sales, either by wholesale or retail ; they assert only the power of regulating the latter, but this entirely within the sphere of their

peculiar authority. These laws are therefore in violation neither of the Constitution of the United States, nor of any law nor treaty made in pursuance or under authority of the Constitution :” (Page 617).

Mr. Justice WOODBURY repeated and enforced the same views, saying, among other things :—

“ It is manifest, also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without license is another and entirely different. The first would operate on foreign commerce, on the voyage. The latter affects only the internal business of the State after the foreign importation is completed and on shore :” (Page 619). “ The subject of buying and selling within a State is one as exclusively belonging to the power of the State over its internal trade as that to regulate foreign commerce is with the General Government, under the broadest construction of that power. The idea, too, that a prohibition to sell would be tantamount to a prohibition to import does not seem to me either logical or founded in fact. For, even under a prohibition to sell, a person could import, as he often does, for his own consumption, and that of his family and plantations ; and also if a merchant, extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another State or abroad :” (Page 620). “ But this license is a regulation neither of domestic commerce between the States, nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the State, and become component parts of its property. Then it has by the Constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges ; and Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States can interfere in regulation of foreign commerce :” (Page 625). “ Whether such laws of the States as to licenses are to be classed as police measures, or as regulations of their internal commerce, or as taxation merely imposed on local property and local business, and are to be justified by each or by all of them together, is of little consequence, if they are laws which from their nature and object must belong to all sovereign States. Call them by whatever name, if they are necessary to the well-being and independence of all communities, they remain among the reserved rights of the States, no express grant of them to the General Government having been either proper, or apparently embraced in the Constitution. So whether they conflict or not, indirectly and slightly, with some regulations of foreign commerce, after the subject matter of that commerce touches the soil or waters within the limits of a State, is not perhaps very material, if they do not really relate to that commerce, or any other topic within the jurisdiction of the General Government :” (Page 627).

Mr. Justice GRIER did not consider the question of the ex-

clusiveness of the power of Congress to regulate foreign and interstate commerce as involved in the decision, but maintained the validity of the statutes in question under "the police power, which is exclusively in the States:" (Pages 631, 632).

The other members of the Court at that time were Mr. Justice WAYNE and Mr. Justice MCKINLEY, who do not appear by the report to have taken part in the decision of those cases, although the former appears, at page 545, to have been present at the argument, and by the clerk's minutes to have been upon the bench when the judgments were delivered. It is certain that neither of them dissented from the decision of the Court.

The consequences of an opposite conclusion in the case from New Hampshire regarding liquors brought from one State into another were forcibly stated by several of the judges. Mr. Justice McLEAN said:—

"If the mere conveyance of property from one State to another shall exempt it from taxation, and from general State regulation, it will not be difficult to avoid the police laws of any State, especially by those who live at or near the boundary." (Page 595).

Mr. Justice CATRON said:—

"To hold that the State license law was void, as respects spirits coming in from other States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequence of which would be that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained market in the neighboring States having similar license laws to those of New Hampshire:" (Page 608).

Mr. Justice WOODBURY said:—

"If the proposition was maintainable, that, without any legislation by Congress as to the trade between the States (except that in coasting, as before explained, to prevent smuggling), anything imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a State, then it is obvious that the whole license system may be evaded and nullified, either from abroad or from a neighboring State. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint, of spirits or wines; and, if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity:" (Pages 625, 626).

Mr. Justice GRIER, in an opinion marked by his characteristic vigor and directness of thought and expression (after saying that he mainly concurred with Mr. Justice McLEAN), summed up the whole matter as follows :—

“ The true question presented by these cases, and one which I am not disposed to evade, is, whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point. It has been frequently decided by this Court ‘that the powers which relate to merely municipal regulations, or what may more properly be called “internal police,” are not surrendered by the States, or restrained by the Constitution of the United States; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive.’ Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category. As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision: *salus populi suprema lex*. If the right to control these subjects be ‘complete, unqualified, and exclusive’ in the State legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others. It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned, and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the States assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime, and protection of the public welfare must of necessity have full and free operation, according to the exigency which requires their interference. It is not necessary, for the sake of justifying the State legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are

within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States : each is acting within its sphere, and for the public good ; and, if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousand-fold in the health, wealth, and happiness of the people : " (Pages 631, 632).

This abstract of the License Cases shows (what is made yet clearer by an attentive reading of the opinions as a whole), that the difference of opinion among the Judges was upon the question whether the State statutes, which all agreed had some influence upon commerce, and all agreed were valid exercises of the police power, could properly be called regulations of commerce. While many of the judges said or assumed that a State could not restrict the sale by the importer and in the original packages of intoxicating liquors imported from a foreign country, which Congress had authorized the importation of, and had caused duties to be levied upon, all of them undoubtingly held that where Congress had not legislated, a State might, for the protection of the health, the morals, and the safety of its inhabitants, restrict or prohibit, at its discretion and according to its own views of policy, the sale by the importer of intoxicating liquors brought into it from another State, and remaining in the barrels or packages in which they were brought in.

The ability and thoroughness with which those cases were argued at the bar and on the Bench, the care and thought bestowed upon their consideration, as manifested in the opinions delivered by the several Judges, and the confidence with which each Judge expressed his concurrence in the result, make the decision of the highest possible authority. It has been accepted and acted on as such by the legislatures, the courts, and the People, of the nation and of the States, for forty years. It has not been touched by any act of Congress ; it has guided the legislation of many of the States ; and it has been treated as beyond question by this Court in a long series of cases : *Veazie v. Moore* (1852), 14 How. (55 U.S.) 568, 575 ; *Sinnot v. Davenport* (1859), 22 How. (63 U.S.) 227, 243 ; *Gilman v. Philadelphia* (1865), 3 Wall. (70 U.S.) 713, 730 ; *Pervear v. Com.* (1866), 5 Wall. (72 U.S.) 475, 479 ; *Woodruff v.*

Parham (1868), 8 Wall. (75 U. S.) 123, 139; *U. S. v. DeWitt* (1869), 9 Wall. (76 U. S.) 41, 45; *Henderson v. Mayor* (1875), 92 U. S. 259, 274; *Beer Co. v. Massachusetts* (1877), 97 Id. 25, 33; *Patterson v. Kentucky* (1878), Id. 501, 503; *Mobile Co. v. Kimball* (1880), 102 Id. 691, 701; *Brown v. Houston* (1885), 114 Id. 622, 631; *Walling v. Michigan* (1886), 116 Id. 446, 461; *Mugler v. Kansas* (1887), 123 Id. 623, 637, 657, 658.

In the *Passenger Cases* (1849), 7 How. (48 U. S.) 283, decided in 1849, two years after the License Cases, statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving from abroad, were adjudged to be repugnant to the Constitution and laws of the United States, and therefore void, by the opinions of Justices McLEAN, WAYNE, CATRON, McKINLEY, and GRIER, against the dissent of Chief Justice TANEY and Justices DANIEL, NELSON, and WOODBURY, each of the Judges delivering a separate opinion. The decision in the License Cases was relied on by each of the dissenting Judges (pages 470, 483, 497, 518, 524, 559); and no doubt of the soundness of that decision was suggested in the opinions of the majority of the Court, or in any of the subsequent cases in which the judgment of that majority was afterwards approved and followed: *Henderson v. Mayor, and Commissioners v. North German Lloyd* (1875), 92 U. S., 259; *Chy Lung v. Freeman* (1876), Id. 275; *People v. Compagnie, etc.* (1883), 107 U. S. 59; *Head Money Cases* (1849), 112 U. S. 580.

When Mr. Justice GRIER, in the *Passenger Cases* (1849), 7 How. (48 U. S.) 462, said—

“And to what weight is that argument entitled which assumes that, because it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases?”—

the context shows that he had in mind cases in which the policy to leave commerce free had been manifested by statute or treaty, and he has already (page 457) made it manifest that he did not intend to retract or to qualify his opinion in the *License Cases*.

An intention on the part of Congress that commerce shall be free from the operation of laws passed by a State in the exercise of its police power cannot be inferred from the mere fact of there being no national legislation upon the subject, unless in matters as to which the power of Congress is exclusive. Where the power of Congress is exclusive, the States have, of course, no power to legislate; and it may be said that Congress, by not legislating, manifests an intention that there should be no legislation on the subject. But in matters over which the power of Congress is paramount only, and not exclusive, the power of the State is not excluded until Congress has legislated; and no intention that the States should not exercise, or continue to exercise, their power over the subject can be inferred from the want of Congressional legislation: *Transportation Co. v. Parkersburg* (1883), 107 U. S. 691, 702-704.

The true test for determining when the power of Congress to regulate commerce is, and when it is not, exclusive, was formulated and established in *Cooley v. Board of Wardens*, (1851), 12 How. (53 U. S.) 299, concerning the validity of a State law for the regulation of pilots and pilotage, in which Mr. Justice CURTIS, in delivering judgment, said:—

“When the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various, subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress is to lose sight of the nature of the subjects of this power, and to assert, concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”

He then stated that the Act of Congress of August 7, 1789, c. 9, § 4 (1 St. 54), in regard to pilotage, manifested the under-

standing of Congress, at the outset of the Government, that the nature of the subject was not such as to require its exclusive legislation, but was such that, until Congress should find it necessary to exercise its power, it should be left to the legislation of the States, because it was local, and not national, and was likely to be best provided for, not by one system or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits ; and he added, in words which appear to us equally appropriate to the case now before the Court :—

“ The practice of the States, and of the National Government, has been in conformity with this declaration, from the origin of the National Government to this time ; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. We are of opinion that this State law was enacted by virtue of a power residing in the State to legislate ; that it is not in conflict with any law of Congress ; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action : ” 12 How. (53 U. S.) 319-321.

In *Gilman v. Philadelphia* (1866), 3 Wall. (70 U. S.) 713, 730, this Court, speaking by Mr. Justice SWAYNE, applying the same test, and relying on *Willson v. Marsh Co.* and *Cooley v. Board of Wardens*, above cited, upheld the validity of a statute of Pennsylvania authorizing the construction of a bridge across the Schuylkill river, so as to prevent the passage of vessels with masts ; and, after stating the points adjudged in *Brown v. Maryland*, and in the *Passenger Cases*, said :—

“ But a State, in the exercise of its police power, may forbid spirituous liquor imported from abroad, or from another State, to be sold by retail, or to be sold at all, without a license ; and it may visit the violation of the prohibition with such punishment as it may deem proper : ” *License Cases*, 5 How. 504.

By the same test, and upon the authority of *Willson v. Marsh Co.*, a statute of Wisconsin, authorizing the erection of a dam across a navigable river, was held to be constitutional in *Pound v. Turck* (1878), 95 U. S. 459, 463. To the like effect

are *Bridge Co. v. Hatch* (1888), 125 U. S. 1, 8-12, and other cases there cited.

Upon like grounds, it was held, in *Mobile Co. v. Kimball* (1881), 102 U. S. 691, that a statute of Alabama, authorizing the improvement of the harbor of Mobile, did not trench upon the commercial power of Congress; and the Court, after pointing out that some expressions of Chief Justice MARSHALL, in *Gibbons v. Ogden*, as to the exclusiveness of the power of Congress to regulate commerce were restricted by the facts of that case, and by the subsequent judgment in *Willson v. Marsh Co.*, said :—

"In the *License Cases*, which were before the Court in 1847, there was great diversity of views in the opinions of the different Judges upon the operation of the grant of the commercial power of Congress in the absence of Congressional legislation. Extreme doctrines upon both sides of the question were asserted by some of the Judges; but the decision reached, so far as it can be viewed as determining any question of construction, was confirmatory of the doctrine that legislation of Congress is essential to prohibit the action of the States upon the subjects there considered:" (102 U. S. 700, 701).

In *Woodruff v. Parham* (1869), 8 Wall. (75 U. S.) 123, a State statute, imposing a uniform tax on all sales by auction within it, was held constitutional, as applied to sales of goods the product of other States, and sold in the original and unbroken packages.

In *Hinson v. Lott*, Id. 148, decided at the same time, it was adjudged that a State statute which prohibited any dealers, introducing any intoxicating liquors into the State, from offering them for sale, without first paying a tax of fifty cents a gallon, and imposed a like tax on liquors manufactured within the State, was valid, as applied to liquors brought from another State, and held and offered for sale in the same barrels or packages in which they were brought in; because, in the words of Mr. Justice MILLER, who delivered the opinion of the Court in both cases, it was not "an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State:" (8 Wall. 153). These two cases were cited by the Court in *Low v. Austin* (1872), 13 Wall. (80 U. S.) 29, 34, and in *Cook v. Pennsylvania* (1878), 97 U. S. 566, 573, in which, in accord with the opinions in the *License Cases*,

State taxation upon original cases of wines imported from a foreign country, and upon which duties had been paid under Acts of Congress, was held to be invalid.

In *Welton v. Missouri* (1876), 91 U. S. 275, the point decided was that a State statute, requiring the payment of a license tax from persons selling, by going from place to place within the State for the purpose, goods not the growth or manufacture of the State, and not from persons so selling goods which were the growth or manufacture of the State, was unconstitutional and void, by reason of the discrimination; and in *Machine Co. v. Gage* (1880), 100 U. S. 676, a State statute imposing a like tax, without discriminating as to the place of growth or produce of material or manufacture, was adjudged to be constitutional and valid, as applied to machines made in and brought from another State.

In *Brown v. Houston* (1885), 114 U. S. 622, it was decided that coal mined in Pennsylvania, and brought in boats by river from Pittsburgh to New Orleans, to be there sold by the boat-load on account of the Pennsylvania owner, and remaining afloat in its original condition and original packages, was subject, in common with all other property in the city, to taxation under the general tax laws of Louisiana; and the Court referred to *Woodruff v. Parham*, above cited, as upholding the validity of a "tax laid on auction sales of all property indiscriminately," and "which had no relation to the movement of goods from one State to another:" (114 U. S. 634).

In *Walling v. Michigan* (1886), 116 U. S. 446, the statute of Michigan, which was held to be an unconstitutional restraint of interstate commerce, imposed a different tax upon persons engaged within the State in the business of selling or soliciting the sale of intoxicating liquors to be sent into the State, from that imposed upon persons selling or soliciting the sale of such liquors, manufactured within the State; and the Court declared that the statute would be perfectly justified as:—

"An exercise by the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people, * * if it did not discriminate against the citizens and products of other States in a matter

of commerce between the States, and thus usurp one of the prerogatives of the national legislature!" (116 U. S. 460).

In *Railway Co. v. Illinois* (1886), 118 U. S. 557, the only point decided was that a State had no power to regulate the rates of freight of any part of continuous transportation upon railroads partly within the State and partly in other States. In *Robbins v. Taxing Dist.* (1887), 120 U. S. 489, a State law requiring the payment of a license tax by drummers and persons not having a regularly licensed house of business within the taxing district, offering for sale or selling any goods by sample, was decided to be unconstitutional as applied to persons offering to sell goods on behalf of merchants residing in other States, because, as the majority of the Court held, its effect was "to tax the sale of such goods, or the offer to sell them, before they are brought into the State:" (120 U. S. 497). Neither of those cases appears to us to tend to limit the police power of the State to protect the public health, the public morals, and the public peace within its own borders.

As was said by this Court in *Sherlock v. Alling* (1876), 93 U. S. 99, 103:—

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off, from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution."

It was accordingly held in that case that an action against a carrier engaged in interstate commerce might be maintained under a State statute giving a civil remedy, unknown to the common law, for negligence causing death; and in subsequent cases that what a State might punish or afford redress for it might seek by proper precautions to prevent; and consequently that a State statute requiring, under a penalty, engineers of all railroad trains within the State to be examined and licensed by a State board, either as to their qualifications generally, or as to their capacity to distinguish between color signals, was not in its nature a regulation of commerce, but was a consti-

tutional exercise of the power reserved to the States, and intended to secure the safety of persons and property within their territorial limits, and, so far as it affected interstate commerce, not in conflict with any express enactment of Congress upon the subject, nor contrary to any intention of Congress to be presumed from its silence: *Smith v. Alabama* (1888), 124 U. S. 465; *Railway Co. v. Alabama* (1888), 128 U. S. 96.

In *Railroad Co. v. Husen* (1878), 95 U. S. 465, it was expressly conceded, in the opinion of the Court delivered by Mr. Justice STRONG, that a State, in the exercise of its police power, could "legislate to prevent the spread of crime or pauperism or disturbance of the peace," as well as "justify the exclusion of property, dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases:" (Id. 471). And the decision, by which the statute of Missouri, forbidding the introduction of any Texas, Mexican, or Indian cattle into the State, was held to be an unconstitutional interference with interstate commerce, rested, as clearly appears in the opinion in that case, and has since been distinctly recognized by the Court, upon the ground that the statute made no distinction in the transportation forbidden, between cattle which might be diseased and those which were not: *Kimmish v. Ball* (1889), 129 U. S. 217, 221.

The authority of the States, in the exercise of their police power, and for the protection of life and health, to pass laws affecting things which are lawful subjects or instruments of commerce, and even while they are actually employed in commerce, has been expressly recognized by Congress in the acts regulating the transportation of nitro-glycerine, as well as in the acts for the observation and execution of the quarantine and health laws of the States: Rev. St. §§ 4278-4280, 4792-4796.

In *Morgan's S. S. Co. v. Board of Health* (1886), 118 U. S. 455, 465, the system of quarantine laws established by the State of Louisiana was held, in accordance with earlier opinions, to be a constitutional exercise of the police power; and it was said by the Court:—

"Quarantine laws belong to that class of State legislation which,

whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress. The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi river, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York."

It was added that, in this respect, the case fell within the principle of *Willson v. Marsh Co.*; *Cooley v. Board of Wardens*; *Gilman v. Philadelphia*; *Pound v. Turck*, and other cases.

In *Mugler v. Kansas* (1887), 123 U. S. 623, the Court said:

"In the *License Cases*, 5 How. 504, the question was whether certain statutes of Massachusetts, Rhode Island and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the Constitution of the United States. In determining that question, it became necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called 'police powers.' Although the members of the Court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any Act of Congress:" (123 U. S. 657, 658).

In *Bowman v. Railway Co.* (1888), 125 U. S. 465, the point, and the only point, decided, was that a statute of Iowa, which forbade common carriers to bring intoxicating liquors into the State from any other State, without first obtaining a certificate from a county officer of Iowa that the consignee was authorized by the laws of Iowa to sell such liquors, was an unconstitutional regulation of interstate commerce. While Mr. Justice FIELD in his separate opinion (page 507) intimated, and three dissenting Justices (pages 514, 515) feared, that the decision was in effect inconsistent with the decision in the *License Cases*, Mr. Justice MATTHEWS, who delivered the judgment of a majority of the Court, not only cautiously avoided committing the Court to any such conclusion, but took great pains to mark the essential difference between the two decisions. On the one hand, after making a careful analysis of the opinions in the *License Cases*, he said:—

"From this analysis, it is apparent that the question presented in this case was not decided in the *License Cases*. The point in judgment in them was strictly confined to the right of the States to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the States was not questioned."

On the other hand, in stating the reasons for holding the statute of Iowa, prohibiting the transportation of liquors from another State, not to be a legitimate exertion of the police power of the State of Iowa, he said :—

"It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border.

But the right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it:" (125 U. S. 479, 498, 499).

In the opinion of the majority of the Court in that case, it was noted that the omission of Congress to legislate might not so readily justify an inference of its intention to exclude State legislation in matters affecting interstate commerce, as in those affecting foreign commerce; Mr. Justice MATTHEWS saying :—

"The organization of our State and federal system of government is such that the People of the several States can have no relations with foreign powers in respect to commerce nor any other subject, except through the Government of the United States and its laws and treaties. The same necessity does not exist equally in reference to commerce among the States. The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character, and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the States, and paramount over all the powers of the States; so that State legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of Congress, or its intention reasonably implied from its silence, in respect to the subject of commerce of both kinds, must fail. And yet, in respect to commerce among

the States, it may be, for the reason already assigned, that the same inference is not always to be drawn from the absence of Congressional legislation as might be in the case of commerce with foreign nations. The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the States is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective States :'' (125 U. S. 482, 483).

In *Kidd v. Pearson* (1888), 128 U. S. 1, a statute of Iowa, prohibiting the manufacture or sale of intoxicating liquors, except for mechanical, medicinal, culinary and sacramental purposes only, and authorizing any building used for their unlawful manufacture to be abated as a nuisance, was unanimously held to be constitutional, as applied to a case in which the liquors were manufactured for exportation and were sold outside the State; and the Court, in showing how impracticable it would be for Congress to regulate the manufacture of goods in one State to be sold in another, said :—

“The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. A situation more paralyzing to the State governments, and more provocative of conflicts between the General Government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine :'' (128 U. S. 21, 22).

The language thus applied to Congressional supervision of the manufacture within one State of intoxicating liquors intended to be sold in other States appears to us to apply with hardly less force to the regulation by Congress of the sale within one State of intoxicating liquors brought from another State. How far the protection of the public order, health, and morals demands the restriction or prohibition of the sale of intoxicating liquors is a question peculiarly appertaining to the legislatures of the several States, and to be determined by them upon their own views of public policy, taking into consideration the needs, the education, the habits, and the usages of people of various races and origin, and living in regions far apart and widely differing in climate and in physical char-

acteristics. The local option laws prevailing in many of the States indicate the judgment of as many legislatures that the sale of intoxicating liquors does not admit of regulation by a uniform rule over so large an area as a single State, much less over the area of a continent.

It is manifest that the regulation of the sale, as of the manufacture, of such liquors manufactured in one State to be sold in another, is a subject which, far from requiring, hardly admits of a uniform system or plan throughout the United States. It is, in its very nature, not national, but local; and must, in order to be either reasonable or effective, conform to the local policy and legislation concerning the sale or the manufacture of intoxicating liquors generally. Congress cannot regulate this subject under the police power, because that power has not been conceded to Congress, but remains in the several States; nor under the commercial power, without either prescribing a general rule unsuited to the nature and requirements of the subject, or else departing from that uniformity of regulation which, as declared by this Court in *Kidd v. Pearson*, above cited, it was the object of the commercial clause of the Constitution to secure.

The above review of the judgments of this Court, since the decision in the *License Cases*, appears to us to demonstrate that that decision, while often referred to, has never been overruled or its authority impugned. It only remains to sum up the reasons which have satisfied us that the judgment of the Supreme Court of Iowa in the case at bar should be affirmed.

The protection of the safety, the health, the morals, the good order, and the general welfare of the people is the chief end of the government. *Salus populi suprema lex*. The police power is inherent in the States, reserved to them by the Constitution, and necessary to their existence as organized governments. The Constitution of the United States, and the laws made in pursuance thereof, being the supreme law of the land, all statutes of a State must, of course, give way, so far as they are repugnant to the National Constitution and laws. But an intention is not lightly to be imputed to the framers of the Constitution, or to the Congress of the United States, to sub-

ordinate the protection of the safety, health and morals of the people to the promotion of trade and commerce.

The police power extends to the control and regulation of things which, when used in a lawful and proper manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the public safety, the public health or the public morals. Common experience has shown that the general and unrestricted use of intoxicating liquors tends to produce idleness, disorder, disease, pauperism, and crime. The power of regulating or prohibiting the manufacture and sale of intoxicating liquors appropriately belongs, as a branch of the police power, to the legislatures of the several States, and can be judiciously and effectively exercised by them alone, according to their views of public policy and local needs; and cannot practically, if it can constitutionally, be wielded by Congress as part of a national and uniform system.

The statutes in question were enacted by the State of Iowa in the exercise of its undoubted power to protect its inhabitants against the evils, physical, moral and social, attending the free use of intoxicating liquors. They are not aimed at interstate commerce. They have no relation to the movement of goods from one State to another, but operate only on intoxicating liquors within the territorial limits of the State. They include all such liquors without discrimination, and do not even mention where they are made or whence they come. They affect commerce much more remotely and indirectly than laws of a State (the validity of which is unquestioned), authorizing the erection of bridges and dams across navigable waters within its limits, which wholly obstruct the course of commerce and navigation; or than quarantine laws, which operate directly upon all ships and merchandise coming into the ports of the State.

If the statutes of a State, restricting or prohibiting the sale of intoxicating liquors within its territory, are to be held inoperative and void as applied to liquors sent or brought from another State, and sold by the importer in what are called "original packages," the consequence must be that an inhabitant of the State may, under the pretext of interstate com-

merce, and without license or supervision of any public authority, carry or send into, and sell in, any or all of the other States of the Union, intoxicating liquors of whatever description, in cases or kegs, or even in single bottles or flasks, despite any legislation of those States on the subject, and although his own State should be the only one which had not enacted similar laws. It would require positive and explicit legislation on the part of Congress to convince us that it contemplated or intended such a result.

The decision in the *License Cases* (1847), 5 How. (46 U. S.) 504, by which the Court, maintaining these views, unanimously adjudged that a general statute of a State, prohibiting the sale of intoxicating liquors without license from municipal authorities, included liquors brought from another State and sold by the importer in the original barrel or package, should be upheld and followed, because it was made upon full argument and great consideration; because it established a wise and just rule regarding a most delicate point in our complex system of government, a point always difficult of definition and adjustment, the contact between the paramount commercial power granted to Congress, and the inherent police power reserved to the States; because it is in accordance with the usage and practice which have prevailed during the century since the adoption of the Constitution; because it has been accepted and acted on for forty years by Congress, by the State legislatures, by the Courts and by the People; and because to hold otherwise would add nothing to the dignity and supremacy of the powers of Congress, while it would cripple, not to say destroy, the whole control of every State over the sale of intoxicating liquors within its borders.

The silence and inaction of Congress upon the subject, during the long period since the decision of the *License Cases*, appear to us to require the inference that Congress intended that the law should remain as thereby declared by this Court, rather than to warrant the presumption that Congress intended that commerce among the States should be free from the indirect effect of such an exercise of the police power for the public safety, as had been adjudged by that decision to be within the constitutional authority of the States.

For these reasons we are compelled to dissent from the opinion and judgment of the majority of the Court.

The fundamental principle, upon which was founded the popular objections to the foregoing judgment, was a principle of Constitutional interpretation irreconcilable with that declared and applied by MARSHALL (*ante*, pages 451, 417, 418), and JOHNSON (*ante*, page 419), and even BALDWIN (*ante*, page 420); that is, the commerce powers ought to be exercised in subordination to the supreme dominion of the States. Its usual form of application is that delivery to the consignee terminates the importation and the State may immediately act upon the merchandise: *ante*, pages 450, 462. This is one of the commonest errors, even by writers who ought to be familiar with the principles of *Brown v. Maryland*, *The Passenger Cases*, *Cooley v. Port Wardens*, and the decisions based upon these judgments (*ante*, pages 420, 439, 441, 442, 459, 462, 466, 470). The newspaper writers cannot therefore be expected to do better than criticise the claim that there must be a transfer of the property from the consignee before the State law applies, as "unreasonable and illogical," and even without a shadow of reason and justice.

A curious variation of this legal heresy is the denial that the owner of an original package has any more rights than he who has broken up the packages in which his merchandise was received, and offers the separate parcels for sale. This denial appears to be prevalent in the Western States, and is perhaps as well expressed as may be by Chief Justice REED of Iowa in *Coltins v. Hills* (*supra*, pages 483, 485). To that opinion may be ad-

ded another thought which has also prevailed, though no Justice of the Supreme Court of the United States has given it countenance. It is, that the State has power to declare certain articles prohibited and no longer merchandise. But Chief Justice TANEY, in the *License Cases* (*supra*, pages 456-7) at its first suggestion and Chief Justice FULLER, in the *Original Package Case* (*supra*, page 499), at its last, have alike laid down the rule that commercial usage, and not bucolic simplicity, or State prejudice affords the test of an article of commerce. The difficulty arises from a misreading of *Brown v. Maryland* and *Woodruff v. Parham*. As the correct understanding of these cases is the subject of the fourteenth division of the leading article (*supra*) on the law governing an original package, it is not necessary to repeat it here: the power of the State does not attach until the original package is broken, but in *Brown v. Maryland* the Court was compelled by the dissent of Justice THOMPSON (*supra*, page 444) to observe the effect of allowing the State to act upon broken up original packages. Yet the line was drawn at that point in the boundary between goods brought in for sale, and those incorporated and mixed up with the mass of property subject to State laws.

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qualifications of the phrase "To regulate commerce," (*ante*, page 420) could have no other reasonable basis than the principle of State superiority already mentioned. Yet, when applied in this manner, such principle of interpretation carries with it the means of its own destruction whenever the necessities of interstate commerce should become as pressing as those which arose from State regulation of foreign commerce: (*ante*, pages 416, 422). The much safer interpretation is that which from time to time, as new necessities arise, like the telegraph and telephone, applies (in the absence of Congressional action) the test of the necessity of general as distinguished from State regulation.

The effort in the *License Cases*, the *Miln case*, and in this dissenting opinion of Justice GRAY, was really to define the police powers of the States. By the authority of these powers and the great mass of judicial expressions relating to them, instead of an Act of Congress, every State was to regulate its own internal traffic, so far as to single out certain commodities introduced from other States and effectually prevent their sale within the State to which they might be shipped. Thus, it has been said that a person in a State which prohibits the sale of liquor, may import it for his own use, "but if he proceed to employ it as a stock in trade, the local government may put forth its police power to restrain the inhibited traffic, even by seizure and destruction of the property." Such is not the law, simply because the local authority is made expressly subject to the Constitutional powers: (*supra*, page 425).

The dissenting opinion of Justice GRAY operates to uphold restraints upon the liquor traffic by giving full play to State laws in all cases where Congress had not acted. Upon first thought, nothing is more entrancing: the local authority should be able to protect the local community, even if that community be some small local option township. But this principle of KENT (*ante*, page 421) was not legitimately used. For this, the inaction of Congress was largely the cause, and that, in turn, was the result of the reaction which brought JEFFERSON to be a commanding political personage: in other words, the country was not truly commercial, not yet bound together by the railroad, the telegraph and the telephone, and the principles of local and social prejudice were dominant. In this condition of the country, State jealousies brought before the Supreme Court, a *Wheeling Bridge Case* as well as *Passenger Cases*, and forced that Court to proceed somewhere, either straight along the boundary laid out by MARSHALL, or declining more or less away from it towards encouraging the jealousies which called for decisions upon concurrent powers and the supremacy of the Constitution, as well as upon the immediate questions of navigation, immigration, and State taxation. Such decisions proceeded from a Court whose supreme judgment had been denied, refused execution by a president of the United States, and finally sustained only by repeated reversals of the State Courts by Justices of both political faiths. It was natural that the Court would uphold its own authority, and would carefully guard the commerce di-

rectly under the care of Congress. Who else could authoritatively decide upon the effect of such action as suitors would suppose to have been taken by Congress in coasting licenses, revenue laws and foreign treaties: for this authority lay at the foundation of the jurisdiction.

The Court was almost compelled to decide that Congressional action and non-action alike were efficacious to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.

JOHN B. UHLE.

ABSTRACTS OF RECENT DECISIONS.

ACTION.

An answer alleging that a note was executed in consideration of the extension of a street railroad by the payee, and deposited with a bank, with the stipulation that it was not to be delivered until the condition was fulfilled, is not demurrable, the road not having been extended. *McLaughlin v. Clausen*, S. Ct. Cal., Aug. 4, 1890.

ADMIRALTY.

A court of admiralty has only jurisdiction of a maritime tort where the damage has been done, and the injury consummated, upon the water. The fact that the wrongful act was done upon a ship is insufficient. Therefore, where libellant, was engaged in repairing a vessel lying in winter quarters at her wharf, access being gained by means of a ladder leading from the wharf to her bulwarks, which was secured at the bottom by a cleat, the removal of which, while the libellant was on the vessel and without his knowledge, caused injury, he cannot recover. *The H. S. Pickands*, D. Ct., E. D. Mich., March 17, 1890.

Lien is not lost by the fact that suit is brought by the master, who is also manager of the company to which the vessel belongs, for the engineer's wages, in the latter's absence, although the claim be knowingly brought for less than is due, and although the manager inform the engineer he could afterwards claim the balance, provided the engineer does not admit the claim as for the full amount, except by ratifying the suit. *The Lillie. Crosby v. The Lillie*, C. Ct., S. D. Fla., March 26, 1890.

APPEAL.

Failure to file the record at the term succeeding the allowance of an appeal, causes the appeal to have no operation or effect. *Small v. Northern Pac. R. Co.*, S. Ct. U. S., March 31, 1890.

But, such failure is not a bar to another appeal within the prescribed time. *Evans et ux. v. State Nat. Bank of New Orleans*, S. Ct. U. S., March 17, 1890.

Filing the transcript of the record, although no citation is obtained or bond given until after the time prescribed for appeal, will give the Supreme Court of the United States jurisdiction of an appeal from a circuit court. *Id.*

BANKS AND BANKING.

An acceptance of a draft will be established by a telegram promising to pay. In re Armstrong, C. Ct., S. D. Ohio, Jan. 18, 1890.

CARRIERS.

Equity has no power, either at common law or under the interstate commerce act, to compel a railroad company to enter into a contract with another company for a joint through rate and joint through routing of freight and passengers: *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co. et al.*, C. Ct., E. D. Ark., March 20, 1890.

Ladies' jewelry carried by a man, traveling alone, in his trunk for transportation is not passengers' baggage, and the carrier will not be liable therefor. *Metz v. California South R. Co.*, S. Ct. Cal., Aug. 4, 1890.

The condition of the cattle at the time of shipment must be looked at, in an action for damages, and the defendants will not be liable where the damage resulted from the condition of the animals. *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.* (*Williams*, Intervenor), C. Ct., E. D. Ind., April 12, 1890.

The duty to feed and water, imposed upon a carrier by Rev. St. Texas, Art. 284, does not arise where there is a special contract that plaintiff shall water and feed the cattle, and the carrier is to stop at a given place for the purpose, provided the carrier was not requested to stop before reaching such place. *Id.*

And under Rev. St. U. S. §4386, which provides that no railroad shall confine live-stock in cars for more than twenty-eight consecutive hours without unloading them, for rest and feeding, for at least five consecutive hours, where there is such a special contract and no specific evidence of damage from failing to feed and water, the carrier will not be liable. *Id.*

CHARITIES.

The validity of a charitable gift for educating two persons for the ministry is not affected by a condition, that they shall, after entering, pursue a certain course, which is not optional with the minister, but subject to the control of the bishop, such condition being subsequent. *Field et al. v. Drew Theological Seminary*, C. Ct., D. Del., February 10, 1890.

A bequest to a corporation not in existence at the testator's death, but to be subsequently created by legislative enactment, is valid. *Id.*

A charitable use is created by a bequest for the education of "two young men, for all coming time," for the Christian ministry; and is valid. *Id.*

CONSTITUTIONAL LAW.

Jurisdiction is not conferred upon the circuit courts, in actions against a State which involve questions arising under the Constitution of the United States, by Art. 3, Sec. 2 of the Constitution of the United States or by the act of Congress of March 3, 1875. *Hans v. State of Louisiana*, S. Ct. U. S., March 3, 1890.

Jurisdiction cannot be conferred upon the circuit courts of the United States, in actions against a State with such State's consent in questions arising under the Constitution of the United States. *State of North Carolina et al. v. Temple*, S. Ct. U. S., March 3, 1890.

Shipping merchandise from one State to another is interstate commerce, and any statute, the requirements whereof are in conflict with those of the interstate commerce act, is not valid: *Baird v. St. Louis, I. M. & S. Ry. Co.*, C. Ct., E. D. Ark., March 18, 1890.

CONTRACT.

Any act of ratification after knowledge of facts which would be sufficient to rescind a contract on the ground of fraud, will amount to an affirmation, and will terminate the right to rescind. *Crooks v. Nippoll*, S. Ct. Minn., Aug. 8, 1890.

CUSTOM DUTIES.

Gun blocks not "rough-hewn or sawed only," but planed on two sides, are subject to an *ad valorem* duty under Act of Congress, March 3, 1883, which prescribes the rates of duty on wood, and wooden wares. Unless "rough-hewn or sawed only" they fall within the classification of "manufactures of wood not specifically enumerated or provided for." *U. S. v. Windmuller et al.*, C. Ct., S. D. N. Y., April 29, 1890.

EJECTMENT.

An action in ejectment can only be had in the Federal Courts upon the strict legal title; therefore, one holding a State certificate of purchase, which is but a contract for the sale of land, to be followed by a patent conveying the legal title, cannot maintain such an action in those courts, whatever effect may be given in the State courts to the State Statute making such certificates *prima facie* evidence of title. *Sweatt v. Burton*, C. Ct., S. D. Cal., April 28, 1890.

EVIDENCE.

Knowledge of the profits of a business and of the books of account is admissible in an action by a manager against his master on a contract whereby the former is to receive half the profits of the business for his services, and the books are not the only evidence of profit. *Schurtz v. Kerkow*, S. Ct. Cal., Aug. 4, 1890.

FIRE INSURANCE.

Condition, in a policy making it void in case inflammable materials are kept or used on the premises but excepting certain oils used for lamps if drawn and filled during the day, applies where the oil is drawn at dusk near a lighted lamp, even though the lamps are not then filled. *Gunther et al. v. Liverpool L. & G. Ins. Co.*, S. Ct. U. S., March 3, 1890.

FOREIGN JUDGMENTS.

A foreign judgment is, in the absence of fraud, conclusive, if rendered by a court of competent jurisdiction in a suit between the same parties, defendant appearing by counsel, although rendered in his absence and without his knowledge, where he does not deny counsel's authority to appear. *McMullen et al. v. Rickie*, C. Ct., N. D. Ohio, February 17, 1890.

FRAUDULENT CONVEYANCE.

Actual or constructive notice of the vendor's financial position must be brought home to the purchaser, where the sale is at a fair price for a new consideration, part whereof is paid down and the balance in the future, in order to invalidate the sale as a fraud upon creditors. *Kellar et al. v. Taylor*, S. Ct. Ala., May 27, 1890.

Mortgage by one of the partners of a firm of his own property in order to carry on the business of the firm is not a fraudulent conveyance. *Rio Grande R. Co. v. Vinet*, S. Ct. U. S., Dec. 29, 1889.

GUARDIAN AND WARD.

Compound interest may be charged where a guardian collects and uses his wards' money, and does not attempt to account for it until compelled to do so. *In re Eschrich's Estate*, S. Ct. Cal., July 30, 1890.

INJUNCTION.

An injunction to restrain the enforcement of a judgment will not be granted merely upon the ground that the attorney has been guilty of negligence in defending the suit; the proper remedy is against the attorney to recover damages. *Barhurst et ux. v. Armstrong et al.*, C. Ct., S. D. Ohio, March 29, 1890.

Injunction will not be granted, in the absence of negligence, and of wanton or unnecessary disregard of the rights of others, where the defendants are making lawful use of the franchise conferred upon them by the State, in a manner contemplated by the statute. *Cumberland Telephone and Telegraph Co. v. United Electric Ry. Co. et al.*, C. Ct., M. D. Tenn., May 19, 1890.

JUDGMENT.

A temporary stay of execution, may be granted by a federal circuit court, upon its own judgments. *Eaton v. Cleveland, St. L. & K. C. Ry. Co. et al.*; *Shrop v. Same*, C. Ct., E. D. Mo., February 21, 1890.

LIBEL.

Libel per se is not sustained by a statement that the plaintiff was not prompted to obtain subscriptions for the World's Fair by patriotism or love of his guild, but by the stimulus of a compensation of two dollars and a half *per diem*. *Goldberger v. Philadelphia Grocer Pub. Co.*, C. Ct., S. D. N. Y., April 15, 1890.

NUISANCE.

A nuisance is not created *per se* where the defendants are making a lawful use of the franchise conferred upon them by the State, in a manner contemplated by the statute. *Cumberland Telephone and Telegraph Co. v. United Electric Ry. Co. et al.*, C. Ct., M. D. Tenn., May 19, 1890.

PARTNERSHIP.

A dissolution may be sued for at once in equity where a party has been induced to enter into a partnership through deceit, or where the business cannot be conducted at a profit. *Rosentsein et al. v. Burns et al.*, C. Ct., S. D. Mass., Oct. 24, 1882.

An executor of a deceased partner carrying on the partnership business with the testator's assets for the benefit of his estate, in compliance with the terms of the will with the surviving partner, is not personally liable for the debts of the firm contracted during the testator's life, and the surviving partner cannot bind him therefor. *Mattison v. Farnham et al.*, S. Ct. Minn., July 17, 1890.

PATENTS AND INVENTIONS.

The expiration of letters patent between the date of service of the bill for infringement and the return day will bar relief in equity, where no special facts are shown. *American Cable Ry. Co. v. Chicago City Ry. Co. et al.*, C. Ct., N. D. Ill., February 10, 1890.

PRINCIPAL AND SURETY.

Contribution will be refused in equity to an administrator of the paying surety after an unaccounted delay of nearly eighteen years, the legal action being barred after three years. *Pickering v. Leiberman*, D. Ct., D. Del., January 8, 1890.

Insanity of a surety does not excuse delay on the part of his co-surety who has paid the debt, where a trustee has been appointed who has sufficient assets to pay the surety's debts. *Id.*

Sureties are liable on their bond, for the misappropriation of money paid to the clerk of a district court as clerk, where the condition is that he shall "properly account for all money coming into his hands," even though the order is not based upon direct statutory authority but upon the practice of the court. *In re Finks.*, D. Ct., W. D. Va., September 7, 1889.

RAILROAD.

Negligence can only be rebutted in an action for damages caused by sparks from a locomotive, by showing not only that proper appliances were used to arrest the sparks, but also that the same were operated in a careful manner by a skillful engineer. *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., Boss et al., Intervenors*, C. Ct., E. D. La., April 1, 1890.

REAL ESTATE.

Recovery on a quantum meruit will not be allowed for services rendered by a real estate agent under a contract to make him the sole agent to sell lots on commission, "which shall be in full for

any service he may render in surveying and laying out the land," even where the agent has made no sales. *Gilbert v. Judson*, S. Ct. Cal., July 30, 1890.

SET-OFF.

Counter-claim for loss of trade occasioned by selling inferior articles will not be sustained in an action for the price of goods sold, where the quantity and quality of the goods sold is easily ascertainable by the senses, defendant having elected to dispose of and pay for them, not the contract price, but their real value. *Stewart et al. v. Townsend*, C. Ct., D. S. C., January 25, 1890.

SHIPPING.

Neglect of duty owed by the owner of a ship to the seamen is not sustained by the failure of a freighting vessel to provide a physician or nurse during a voyage. *McCormack v. The Wensleydale*, D. Ct., E. D. N. Y., March 10, 1890.

TRESPASS.

Seizure by a mortgagee of the property under a chattel mortgage which is void on the ground of usury or fraud, without the mortgagor's consent is a trespass for which action lies, and exemplary damages may be allowed where the property is taken and carried away. *Kemmitt v. Adamson*, S. Ct. Minn., July 18, 1890.

USURY.

Action lies to recover back the difference between the usurious interest actually paid, and the amount that would be due for interest at the highest legal rate, even where there is no statute giving such right, and although the payment be voluntary. *Bexar Building & Loan Ass'n. v. Robinson*, S. Ct. Texas, June 17, 1890.

A note given for seventeen dollars with interest at ten per cent. per annum, only fifteen dollars being loaned, the two being added as additional interest, is void as usurious. *Kemmitt v. Adamson*, S. Ct. Minn., July 18, 1890.

VENDOR AND VENDEE.

Improvements made by a party upon property which he has contracted to buy from husband and wife, and upon which he has entered without consent, the contract being silent as to possession, and the wife subsequently refusing to convey, cannot be recovered as damages in an action for breach of contract. *Cartin v. Hammond*, S. Ct. Mon., July 22, 1890.

WARRANTY.

An implied warranty, that goods are of a certain quality, and known to the trade by certain names, does not exist where the contract states "These goods to be exactly the same quality as we make for other persons," "and as per sample bbls. delivered." "Turpentine copal varnish at 65 cts. per gallon; turpentine japan dryer at 55 cts. per gallon," the last clause being merely a regulation of the price. *DeWitt et al. v. Berry et al.*, S. Ct. U. S., March 17, 1890.

ERNEST WATTS.

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THE MICROSCOPE AND THE CAMERA IN THE DETECTION OF FORGERY.

EXEMPLIFIED BY PHOTOGRAPHS OF SIGNATURES IN
THE JEROME WILL CASE.

The subject of this paper is one of great practical importance in the administration of justice; and while not undertaking to treat the subject exhaustively, we shall endeavor to give some points which may be of value in subsequent cases.

The modes of committing forgery are various: (1) By alteration of the document in question, which may consist (a) of an erasure or erasures; (b) of additions to the instrument; (c) of both erasures and additions. (2) By the forgery of the entire writing, or of the signature. This may be accomplished in several methods:—(a) by tracing a fraudulent signature over a genuine signature by means of the pen or pencil; and (b) by copying or imitating the genuine signature otherwise than by tracing.

The methods of detecting frauds thus committed are various, according to the nature of the fraud:

First: Composite Photography has been proposed as a means of determining the authorship of disputed docu-

ments. While this method seems to be founded on correct scientific principles, yet in our opinion the cases in which it may be applied in practice will be very few, if any. In order to apply this method for the identification of a writing, whose authenticity is questioned, very much more material is required than is usually available in any case presented in court. As a rule, questions of authenticity arise principally with reference to disputed signatures; and under the rules of evidence applicable in England and in most of the States, it is very difficult, if not impossible, to procure other similar signatures, as a means of identification; and without a very considerable number of similar signatures, this method can not be adopted. Moreover, the difficulties of technique are such as to render it impracticable in the hands of an ordinary observer.

Second: Another means of identifying the authorship of a document is that proposed by Prof. T. C. Mendenhall, and published, I believe, in *Science* some years since. This method consists in what may be styled "Curves of Literary Style," the co-ordinates of which, if I remember correctly, consist of the number of words and the number of syllables which they respectively contain. This method, although very interesting and probably of considerable scientific value in cases to which it is applicable, is not, in the opinion of the writer, of any practical value in the ordinary administration of justice as cases are presented for adjudication in court; for the reason that it requires vastly more material than is ever accessible in ordinary practice.

Third: The ordinary method of identifying writing in use in courts of justice is that styled "Comparison of Hands." In this connection a brief review of the rules of law applicable to this case may not be inappropriate. By the English common law, a witness is competent to testify respecting the genuineness of a disputed writing—(1) if he has seen the party alleged to have made the writing in question, write; and it is sufficient for this purpose that the witness has seen him write but once, and then only his name.

(2) The second mode of acquiring knowledge of the hand-writing of another, is by the receipt from such person of written communications purporting to be in his hand-writing, either in the usual course of business or in reply to letters written by the witness, provided such communications have been acted upon as genuine by the parties, or adopted as such in the regular course of business. (3) Another method is by means of the comparison of the specimen in question with fairly selected, undisputed specimens of the alleged hand-writing. With respect to this third method, there is considerable conflict of authority. By the English common law such comparison was permitted in two cases—(a) where the writings in question are of such antiquity that living witnesses can not be had, and yet are not so old as to prove themselves. Here the course is, to produce other documents, either admitted to be genuine or proved to have been respected, treated and acted upon as such by the parties, and to call experts to compare them and to testify their opinion concerning the genuineness of the instrument in question. (b) Where other writings admitted to be genuine are already in the case.

Considerable diversity of practice at present prevails in England and in the various States of the Union; this diversity has been brought about partly by statutory enactment, and partly by decisions of the courts. Without undertaking to go into the details of the subject, we may state that in the State of Illinois the English rule is applied with some strictness, and excluding the case of ancient documents, the only case, as we understand it, in which a comparison of hands by experts is permitted, is where other writings admitted or proved to be genuine, are properly in evidence and pertinent to the case: *Brobston v. Cahill* (1872), 64 Ills. 356, in which the rule laid down in *Jumpertz v. The People* (1859), 21 Id. 408, is explained and qualified. See also in general, 1 Greenleaf on Evidence, Sec. 577 *et seq.*; Chamberlayne's Best on Evidence, Sec. 232 and Note; Roger's on Expert Testimony, Sec. 139, 140 *et seq.*

With reference to this third method, by comparison of hands, two cases arise—First, Where the material upon which the judgment is based consists of the disputed and genuine signatures, and, Second, Where the material at hand consists of a letter or letters, or other documents more voluminous. In the former case, the judgment arrived at does not, of course, possess the same weight as where more material is at hand upon which to form a judgment; nevertheless, cases do arise in which the expert is warranted, upon a comparison of the signatures, in expressing a very clear opinion that the signatures were or were not made by the same person.

As to the method of arriving at an opinion upon the comparison of one or more other signatures, the cases are so diverse that no general rules can be laid down. Each case must be decided upon its own particular facts.

In the second case, not unfrequently a conclusion can be arrived at having a high degree of probability amounting almost to a moral certainty. In arriving at a conclusion, many things are to be considered—not only is the form of the letters important, but their manner of combination to form words is even more important. The use of capitals, punctuation, mode of dividing into paragraphs, of making erasures and interlineations, idiomatic expressions, orthography, mechanical construction, style of combination, and other evidences of habit, are important elements upon which to form a judgment. An interesting case of this kind occurred in the Greenwich County Court; the party denied most positively that a certain receipt was in his hand-writing. It read: "Received the Hole of the above." Upon being asked to write a sentence containing the word 'whole'; he took pains to disguise his hand; but used the above phonetic style of spelling, even writing the capital "H"; and then he ran away to escape prosecution for perjury: *Roger's Expert Testimony*, Sec. 146; *Taylor on Evidence*, Sec. 1669. Note; *Greenleaf on Evidence*, Sec. 581. Note.

Some years since, two anonymous letters, together with a

number of letters written by several different persons, and the minutes of a scientific meeting written by a party not suspected of being the author of the anonymous letters, were submitted to the writer for his opinion. A careful study of the documents led the writer to the conclusion that the anonymous letters were written by the writer of the minutes above referred to; this conclusion was so much at variance with the opinion of the party who submitted the documents for examination that he was disposed to reject it. The writer, however, persisted in his opinion, and upon confronting the supposed author of the anonymous letters with the opinion, and accusing him of the authorship of said anonymous letters, he broke down and acknowledged himself to be their author. In this case, while the form of the letters in the several documents was not by any means identical, yet the manner of combining the several letters to form the more common particles, such as "the", "and", "of", "to", "for", etc., was identical in every instance, thus demonstrating to the mind of the writer the identity of their authorship.

Perfect identity of two signatures is very strong, if not conclusive, evidence of fraud. No two autograph signatures by the same hand will be exactly alike. In the famous Howland Will case (*infra* page 562), Professor Pierce, at that time professor of Mathematics in Harvard University, testified that the odds were 2,866,000,000,000,000,000,000, to 1, that an individual could not with a pen write his name three times so exactly as were the three alleged signatures of Sylvia Ann Howland, the alleged testatrix of the will and two codicils. If, therefore, upon superposition against the light, two signatures exactly coincide, it is morally certain that one of them is a forgery.

(4) Another means of detecting forgery is by the internal evidences of fraud, afforded by the writing itself, with or without the aid of comparison with other and genuine writing.

These internal evidences may consist of alterations, such as erasures, additions, etc., above described, or of tracings of

the genuine signature by means of a pen or pencil, which tracings are afterwards inked over with a pen ; or they may be found in a copy of a genuine signature otherwise than by tracing in the several manners above described. The copy or imitation of the genuine signature may be either free-hand or composite, by which latter is meant that the signature is made discontinuously or by piece-meal. The detection of frauds attempted in the manner first above described is comparatively easy. A very low power of the microscope will readily reveal the erasures, and not unfrequently, the word erased may be made out. When the signature has been traced over a genuine signature, usually the forger will be found to have failed to entirely cover the original tracings, the character of which, by the aid of a low power can usually be satisfactorily made out. In this case, also, the signature will usually be found to be discontinuous, and the places where the pen has been put upon and removed from the paper in endeavoring to cover up the original tracings can be readily made out, and when thus made out this fact is strong, if not conclusive, evidence of fraud. When the signature has not been traced, but is composite or made by piece-meal in the manner above described, this can almost always be satisfactorily made out by the use of a low power, and when this composite character is so made out it is likewise strong, if not conclusive, evidence of fraud. Not unfrequently, by the aid of the microscope it can be determined that alterations of the instrument were made with a different pen and with different ink ; and, not unfrequently, the order in point of time in which they were made, can likewise be determined. In questions of this sort, and in general in cases of disputed signatures, photography is of very great service. In the comparison of disputed signatures, the writing in question should, if possible, be compared with the original and not with a photographic copy, such copy being considered by most courts as secondary evidence ; nevertheless, photographic enlargements of genuine and disputed signatures, the correctness of which is established by testimony, are very useful as a means of illustrating the evidence of the expert.

Not unfrequently also, by the aid of photography, differences in ink may be made out which are insensible to ordinary observation.

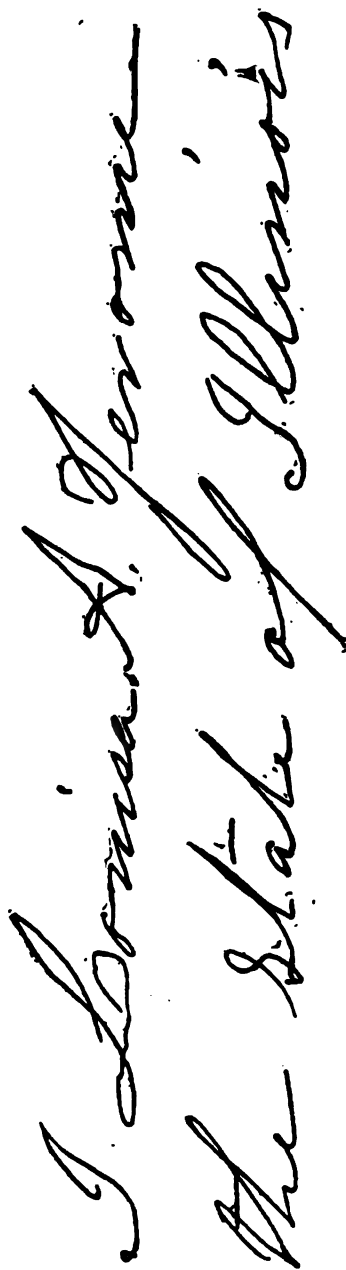
Many of the points above discussed were well exemplified in the Jerome will case recently decided by the Probate Court of Cook County. In this case a most audacious attempt was made to impose upon the Court a forged for a genuine will. The case turned upon the authenticity of the signature to the will, there being no dispute as to the handwriting in the body of the will. The signature in question (a bromide enlargement of which is herewith presented for consideration) was what I have above styled as a composite signature.

At what I may style the cardinal points of the signature there appeared upon the paper, in immediate juxtaposition to the signature, numerous indentations, which appeared to have been made with an instrument with a somewhat rounded point; these indentations with two or three exceptions, did not come in contact with the writing; the writer was clearly of the opinion and so testified, that in his opinion, from their position, they were made as caliper marks or guides to the signature subsequently written. In one instance, namely, at the top of the initial "L," the mark took the form of a line extending across the loop of the letter "L," and the writer was able by microscopic examination, to testify to the opinion that it was made before the signature was written. As also was the case with respect to one or two other of these indentations. The signature was likewise a composite one from the fact that the pen of the writer appeared to have been removed from the paper at unusual places, forming breaks in the continuity of letters which are usually made by a continuous motion of the pen. This is well exemplified by the photographs. An examination under a low power likewise revealed the fact, that in a number of instances, the signature had been patched, or the lines re-traced in certain portions where such patching or re-tracing would not ordinarily occur if the signature were a natural or genuine signature.



Louis A. Peronne Agent.

Plate I: Genuine Signature on a Check.



Louis A. Peronne
The State of Illinois

Plate II: Genuine Signature.

Plate III: The Forged Signature.

From the combination of these three different classes of facts, the writer was able to testify to the opinion that the signature was a forgery. At this time, there was not in the case any genuine signature with which the signature in question could be compared, and under the laws of the State of Illinois, as I have already stated, no signature could be used for such purposes unless properly in evidence in the case. This want, the proponent's counsel supplied by his manner of cross-examination of one or more witnesses put upon the stand by the party opposed to the probate of the will. Enlarged copies of two of the signatures thus received in evidence are herewith presented. The differences between the forged and the genuine signatures will be apparent from the examination of these enlargements.

The Court was of the opinion that the signature was not a genuine signature, and probate of the will was refused.

MARSHALL D. EWELL.

Chicago, Ill.

[The above was read before *The American Society of Microscopists* at their meeting in Detroit, August 12, 1890, and in connection with appended statement of the Howland Will Case, will assist in establishing the limit upon this use of expert evidence.—Ed.]

THE HOWLAND WILL CASE.

By the courtesy of the publishers of *The American Law Review*, the following extract from the pages of that magazine (vol. 4, pages 629-54) is appended for the elucidation of Prof. Ewell's reference, *supra*, page 556 :—

The will of Miss Howland was duly proved in the Court of Probate for Bristol County. An appeal was then taken by Miss Robinson, on the ground that the testatrix was incompetent to make a will by reason of mental and bodily weakness and infirmity; and that being in feeble health and of weak mind she was unduly, improperly, and illegally influenced by those about her. But the appeal was shortly after withdrawn, and the decree of the Probate Court affirmed by the Supreme Judicial Court, at the November term, 1865. On the second day of December, 1865, Miss Robinson filed in the Circuit Court of the United States for the District of Massachusetts, she being then, as she alleged, a citizen of New York, a bill of complaint against the executors and trustees, which initiated this litigation.

This bill, in addition to the facts to which attention has already been called, makes in brief the following allegations: that the complainant had been educated by her aunt, who had long stood to her in place of her mother, and that her aunt, being at variance with her father, and being anxious that no property from the Howland stock should come to him, had requested her to make a will excluding her father from inheriting her property, and had agreed to do likewise; that thereupon she and her aunt had made mutual wills excluding her father from such inheritance, and had exchanged them; and that it was agreed between them that neither should make any other will without notifying the other, and returning the other's will; that this had never been done, and that the complainant had no knowledge that her aunt had ever made another will until after her death. The bill alleges, in ordinary form, the execution of the will; and then it is alleged that "before signing the said will, the said Sylvia Ann signed the paper writing called therein the second page of this will, which last mentioned paper was attached to the said will by the said Sylvia Ann before the said will of the said Sylvia Ann was signed by the said Sylvia Ann;" that this paper was delivered to the complainant with the will; that in reference to the statement contained in the paper, "excepting about one hundred thousand dollars in presents to my friends and relations," the complainant when she received the will, promised to distribute this amount among such persons as her aunt should designate, and that her aunt did designate certain persons to whom this sum should be paid. The prayer of the bill was for the specific performance of this agreement, and that the executors should be decreed to hold her aunt's property (all of which was, by the will, said to have been made in accordance with this agreement, left to Hetty, absolutely), in trust for her, and should be ordered to convey it to her. To the bill was annexed a copy of the will then made by the complainant, bearing date September 9, 1860, which,

after bequeathing her property to her children, should she have any, gives the whole of it in case of her decease without issue, to the Home for Children in New Bedford.

Of the aunt's will, the following is a copy. How much of the date was written at the execution was disputed. The *italics* are hereafter explained.

First Page.

Be it remembered that I, Sylvia Ann Howland, of New Bedford, in the county of Bristol and Commonwealth of Massachusetts, of lawful age, and of sound and disposing mind and memory, do make, publish, and declare this my last will and testament in manner following to wit:—

First. I give and bequeath unto my niece, Hetty Howland Robinson, all my Real and Personal estate, goods, and chattels, of every description, including the Round Hill Farm, and every thing thereon; house on the cor of Water and School and First, and every thing on and belonging land and buildings to her the said Hetty H. Robinson, and her children and assigns for ever.

Second. If the said Hetty H. Robinson dies without children or grand-children before me, I wish it to go to the Charity Schools and institutions named in will of 1856,—3 month, 4th day,—with these trustees, Thomas Mandell, Cornelius Howland, Henry Taber.

Third Page.

Third, I appoint Thomas Mandell of New Bedford, Executor of this my last will and testament *also Executor of the 2d page of this will.*

In witness whereof I have hereto set my hand and seal this *eleventh* day of *January*, in the year of our Lord one thousand eight hundred and sixty two.

Sylvia Ann Howland, (SEAL.)

Signed, sealed, published, and declared by the said Sylvia Ann Howland, as and for her last will and testament, in presence of us, who, at her request, and in her presence, here hereto set our names as witnesses.

Peleg Howland, (SEAL.)

Kezia R. Price, (SEAL.)

Electa Montague, (SEAL.)

And to this is annexed the singular paper following, known throughout the case as the—

Second Page.

Be it remembered that I, Sylvia Ann Howland, of New Bedford, in County of Bristol, do hereby make, publish, and declare this the second page of this will and testament made on the eleventh of January in manner following: to wit, hereby revoking all wills made by me before or after this one—I give this will to my niece to shew if there appears a will made without notifying her, and without returning her will to her through Thomas Mandell, as I have promised to do, I implore the Judge to decide in favor of this will, as nothing would induce me to make a will unfavorable to my niece; but being ill and afraid if any of my caretakers insisted on my making a will to refuse, as they might leave or be angry, and know-

ing my niece had this will to show—my niece fearing also after she went away—I hearing but one side, might feel hurt at what they might say of her, as they tried to make trouble by not telling the truth to me, when she was here even herself. I give this will to my niece to shew, if absolutely necessary to have it, to appear against another will found after my death. I wish her to show this will, made when I am in good health, for me; and my old torn will, made on the fourth of March, in the year of our Lord one thousand eight hundred and fifty, to show also as proof that it has been my lifetime wish for her to have my property. I therefore give my property to my niece as freely as my father gave it to me. I have promised him once, and my sister a number of times, to give it to her, all excepting about one hundred thousand dollars in presents to my friends and relations. In witness whereof I have set thereto my hand and seal this eleventh of January, in the year of our Lord one thousand eight hundred and sixty-two.

SYLVIA ANN HOWLAND. (SEAL.)

The answer of the executors is quite long, and alleges a great many matters in defence. It denies that the complainant was educated by her aunt. It admits Hetty's ill-feelings towards her father; but denies that any such existed between her father and her aunt. It alleges their ignorance of the secret arrangement as to the mutual wills, and states that if any such existed, it had its origin in Hetty's ill-feelings toward her father. It alleges that Mr. Mandell had care of Miss Howland's property for thirty years; that she never manifested any desire that Hetty should have the whole; but that during this time she made several wills inconsistent with such desire; that if Miss Howland signed the second page, she did so without such knowledge or understanding of its contents as would in law or equity bind her; that its contents are at variance with Miss Howland's well-known wishes and sentiments. It denies, on information and belief, the attachment of the "second page" to the will, and the circumstances of its delivery to Hetty alleged in the bill; and it avers that Hetty knew of the will admitted to probate.

The answer also alleges that the will and "second page" are in the handwriting of Hetty, and that if her aunt signed the latter, she was forced to do so by her niece's continued importunity and undue influence; that Hetty took back into her possession her own will, and has since made other inconsistent wills.

The answer then sets up as defences, in matter of law, that upon Mr. Robinson's death, the consideration of the alleged compact failed; that, in any event, it was void as against good morals and public policy; that considering the large property possessed by the aunt, and the comparatively insignificant sum held by the niece, it was unequal and unconscionable; that by Mr. Robinson's death, the agreement became inoperative because no money could be left him; that its terms are too vague to be enforced; that her father is not legally excluded by Hetty's will, but might possibly inherit; that Hetty's will was revocable by marriage; that Mr. Robinson's death absolved Miss Howland from notifying Hetty of her change of intention; that the will of Miss Howland was not in conformity

with the agreement ; that the probate of the will was conclusive upon the questions raised by the bill ; that the alleged agreement was not in writing, and void by the Statute of Frauds ; and, generally, that such an agreement was void, and could not be enforced in equity.

The will of Miss Howland and "the second page" were admittedly, as alleged in the answer, in the handwriting of the niece ; the signature, " Sylvia Ann Howland," being all that was claimed to be in the aunt's handwriting. The main issue of fact raised was whether the signature to the second page was written by Miss Howland, or whether it was a forgery. If it was a forgery, of course it followed that the complainant's case, which rested mainly on her own evidence, was but a tissue of fraud. The object of the defence of the executors upon matters of fact was to cast such taint upon the agreement that sufficient credence could not be given to the story to justify a court of equity in decreeing specific performance, or if belief could be attained in the existence of the agreement and the genuineness of the "second page" to show the agreement so unfair, indefinite, and inequitable, and so contrary to the public policy, that a court of equity would decline to order its specific execution.

Desiring, therefore, to set down the facts, as they are found recorded in the printed testimony of the cause, and not our own conclusions, we proceed to notice the evidence of the complainant. This at once divides itself into two distinct parts : *first*, the evidence tending to prove the facts of the agreement for the mutual wills, the execution of Miss Howland's will with "the second page," the delivery of these to the complainant, the execution of the complainant's will, its delivery to Miss Howland and its subsequent discovery among the effects of Miss Howland after her death ; *second*, the evidence brought to contradict the testimony of the respondents of the forgery of the signature to "the second page." The *first* class consists of testimony of facts, the *second* of testimony of opinion.

Considering, then, this *first* class, it is found to rest mainly upon the complainant's testimony. The other witnesses to facts do little more than corroborate her in certain particulars. To the actual agreement itself there is but the single testimony of the complainant, corroborated by no living witness, but solely by "the second page" in her own handwriting, the authenticity of which rested solely upon the genuineness of the signature of the aunt.

Hetty Robinson draws this picture of her aunt : an old woman, from her birth an invalid ; weak in body, but sound in mind ; timid, anxious, surrounded by house-keepers and nurses who constantly looked for her death, and longed for their own expected legacies ; sharp old New England females, called by the expressive term, "care-takers ;" depending solely upon Hetty, loving her, fearing "the care-takers," saying, "they would not get the advantage of her as long as she had any strength left ;" "that she would pacify them by telling them that she would give them (not leave them) money, which would make it for their advantage to keep her alive ;" trusting wholly in her only niece ; so nervous as for many years before her death to be unable to write anything but her name ; subject to such "distressed spells," that she could hardly write a letter, and

therefore making this niece not only her confidant, but her amanuensis ; of herself as substantially the adopted child of her old aunt, under her care as a child, as a woman never doing anything of importance without her aunt's knowledge ; living with her many years in the closest of intimacy, protecting her from the "care-takers," the prop and support of her old age. She tells of the indignation felt by Miss Howland at Mr. Robinson's taking the property of his wife according to Judge Thomas's opinion. "She was so much grieved about it," she says, "crying, to think that my father had enough already of the Howland estate."

Then she goes on to tell of the compact. "She asked me if I would make a will satisfactory to her, she would make a will in my favor, so that my father could get no more of the Howland estate, and we would make a solemn contract that neither will should be revoked without returning the other's will to the other through Thomas Mandell. She was to keep mine and I hers: mine to stand just as it was until hers and my father's death. Her will I had was to be until her death." To this proposal the niece, as she says, agreed. Through the mediation of Mr. Tucker, Mr. Prescott, of New Bedford, drafted a will for Miss Robinson ; but as this contained a legacy to Mr. Robinson, his sister-in-law objected to it ; and the two women, being then at Round Hills, sitting down and using a slate, and referring to the Prescott draft for forms, taking a number of days for the work, the aunt dictating, the niece writing, finally accomplished the will of Miss Robinson, leaving all her property to her issue, or, failing issue, to the Home for Children. This was subsequently executed and witnessed, placed in a long yellow envelope, and given to the aunt to be kept among her private papers. This will was written, excepting the date, at Round Hills, and was signed by Miss Robinson in black ink. When she came up from Round Hills, she wrote over her signature in blue ink, adding also the date (Sept. 9, 1860) in blue ; then the witnesses signed.

The slate was used in drafting the aunt's will at Round Hills. Two drafts were made and brought up to New Bedford, one of which was the will subsequently executed, which has been given on page 563. The words printed *in italics* were not then written. The will was not executed, for the reason, as Miss Robinson explained, that both aunt and niece thought that the later a will was executed prior to the testatrix's decease, the more binding it would be. This was in the summer of 1860. There was then in existence, a former will of the aunt's, made in 1850, with a codicil in 1854, in the care of Mr. Mandell. This will, a very long document, placed her property in trust, and, after some legacies, gave the income to her sister and niece ; and after their death, divided it in certain proportions between Hetty's issue and charity. This, the complainant says, her aunt cancelled in August, 1861 ; tearing off her signature, and giving it thus mutilated to her niece, "to show that I had the whole income after my mother's death, and also, as she had torn her signature off, to show that it was not satisfactory to her."

We next come to the niece's account of the execution of the will, drafted, according to her story, in the summer of 1860, but bearing date the 11th of January, 1862, and its curious and singular connection with the

second page. The story passes to January, 1862. The aunt and niece are then at New Bedford, at the aunt's house; and Miss Robinson relates the following events as occurring between the 1st of January and the 11th, the day of execution of the will. Taking the slate, the two women compose the contents of "the second page," and Miss Robinson copies it out on paper,—a copy subsequently burned.

Then a will is written out on paper substantially the same as that given on page 563, except that the document known as the "second page" is incorporated in it, and forms its *second page*. Hence the origin of the term "second page." This is exhibit numbered 11. It is produced, and is in the niece's handwriting. It did not bear Miss Howland's signature, and was never executed, as explained by the complainant, "because my aunt so assured me that they would not get the advantage of her, saying, that if she broke her promise to her niece, that she had taken from her dying mother to live with her again, that she would be worse than most any one in the House of Correction, because they wouldn't lie to their relatives as a general thing. . . . If they do get a will out of me, it will be after I have no strength to oppose them; and you will see how rapidly I will fade away. If they are bad enough to tease me to make a will, after I have distinctly told them that I have promised not to, any will that they would get me to make, it would take a great deal to satisfy them. And they would have so much of human nature, it would be to their interest to get possession of their money, being human nature enough to say, 'Poor Miss Howland, she can't enjoy life, she suffers so much.'" The niece, as she says, then suggested to her to leave out that part called the second page, "because it would be very awkward for me to have it recorded, if they did not succeed in having her to make a will,—if the caretakers did not succeed." It was then arranged that the "second page" should be written out separately, and attached to a will in a manner which would render it easily detached. "If they did not get the advantage of her, then I could detach it, only showing it to Mr. Mandell, and perhaps the judge; and if they did get the advantage of her, telling the judge that it was,—that she hoped that he would take them as words that she would say if she was alive. Then," says Miss Robinson, "I was to copy the 'second page' of Exhibit 11 (the draft, we repeat, of the will incorporating the second page, and thus giving, as it was claimed, the designation 'second'), beginning it something as a will, and ending it something as a will." By her aunt's permission, she then added a few words to the draft made at Round Hills, namely, the words printed in italics, "*first page*," "*third page*," "*also the executor of the 2d page of this will*," and the date. Then she wrote out two copies of the "second page." Both of these her aunt signed,—one in the morning of the 11th of January, the other after tea the same day. The niece took "very fine thread," and caught both these copies to the first page of the will, and arranged them in such a manner that they could not be seen by the attesting witnesses. In the evening, Peter Howland, Keziah R. Price, and Electa Montague were called in. The old woman told her niece to stand by, and if she forgot to say it was her last will and testament, to suggest to her to do so, and thus the will was executed. She read it over next

morning, says her niece, "putting her hand on a Bible where the names of her relatives were registered." About this time, too, was composed the list of the relations among whom the \$100,000 were to be divided. A slate of these was made up, and a copy kept by the niece, while at the same time another copy was prepared on tissue paper, and kept by the old lady in her spectacle case, for easy reference. The duplicate second pages remained attached to the will but a single night. Next morning, the very fine thread was severed by Hetty in the presence of her aunt. One duplicate was given to her to take to New York, with directions to reattach it to the will, should the influence of the care-takers overcome the invalid's resolution; while the other was placed in a white envelope, together with a copy of the will, and retained by Miss Howland.

The duplicate selected for the niece was that signed after tea, for the curious alleged reason that, being signed nearer the moment of the execution of the will, it more nearly resembled the signature to that instrument than that signed earlier in the same day.

Time goes on, and in a little more than three years from these events the aunt dies. On the evening of the day, or the day after, her funeral, the niece, with Mrs. Brownell the house-keeper, go to a little hair trunk in a closet, where the aunt was in the habit of keeping her papers. The search is for Miss Robinson's will. They do not find that, but do find the white envelope containing the copy of the aunt's will and the duplicate "second page" (known as Exhibit 15) retained by her. Next morning the search is renewed, in the presence of Mr. Edward H. Green, to whom Miss Robinson is now betrothed, and the long yellow envelope containing her will is discovered and opened. The niece has never heard of the new will. The mutual contract has been violated, and thus ends the story.

To this secret agreement between the old woman and the young, there is professedly no corroboration. Its very essence was secrecy. The complainant tells her story. The lips of the other party to the contract are closed in death. No human eye had ever beheld these duplicate second pages before the death of the woman who is claimed to have signed them. They were purposely hidden from the witnesses who signed the will of which they are alleged to be a part. These witnesses each tell the story of their witnessing Miss Howland's will. The execution of Miss Robinson's will also is proved. Mr. Green gives an account of the discovery of the papers in the aunt's trunk after her death. Miss Virginia R. T. Gerrish corroborates the complainant as to the intimate and affectionate relations testified by her to have existed between her aunt and herself, and relates that, in New York, on the Sunday evening when the news came of Miss Howland's death, the niece produced and read to her the will and "second page." This, with the documentary evidence, makes the complainant's case,—always excepting the expert testimony as to the genuineness of the several documents, of which hereafter. And to this should be added the admission contained in the answer of one of the defendants, Dr. Gordon, whether the conclusions to be drawn from it are favorable or unfavorable to the complainant, that Miss Howland had said to him in substance, "I would rather not make a will if I could help it, on account of Hetty. I have been obliged to promise her that I would not make a will without

letting her know it." Also, "that, she would make a will if it was not for her pledge or promise to Miss Hetty," and that she said, as a part of the last conversation, "I was forced to promise her so, she dinned me, and teased me, and gave me no peace till I did;" that she asked Gordon his advice, and that thereupon he said that he believed a promise extorted from one was not considered binding in honor or in law, to which Sylvia Ann replied, "No? Well, it was so, it was forced from me."

We turn now to the evidence of the executors. Their foremost defence is forgery. They claim that the signatures to both the duplicate second pages—Exhibits "10" and "15"—were forged by Miss Robinson by tracing from the signature to the will admitted to be genuine. This charge they attempt to support by a vast mass of expert testimony, which will be considered in its proper place. It is not only however upon this expert testimony of the falsity of the signature that the executors rely. Taking up the complainant's testimony, they proceed to introduce evidence tending to contradict it in a number of particulars. The care-takers are called "nurse-witness-legatees," as they are characterized by Miss Robinson's counsel, and proceed to give a very different account of the relations existing between the aunt and niece. Electa Montague, one of the care-takers, a veteran companion of aged ladies of New Bedford; Sally Brownell another care-taker, the house-keeper, for over twenty years a servant of Miss Howland's; Sarah Howland, a distant connection, but a constant visitor, who nursed the old woman in her last illness; Eliza H. Brown, the night nurse; Hetty H. Hussey, her cousin; Joanna Curtis, the cook, all substantially concur. They represent the relations existing between the aunt and niece as not always the most agreeable, and depict themselves as the faithful friends upon whose consolation and support the old lady was wont chiefly to rely. They are most of them legatees under the last will, and profess little love for the complainant.

By these, and other witnesses, the defendants endeavor to paint in different colors the facts testified to by the complainant, and to throw new lights upon affairs at Round Hills and New Bedford. It would be impossible, in the limits of this article, to detail their varying success or failure in controlling the niece's testimony. In a cause as carefully tried as this, so elaborately argued, scarce a fact is elicited on this record of a thousand pages, which does not tend to sustain some theory, some probability, on the one side or the other. Some striking points of the defendant's case only can be mentioned. By the evidence of the relations of the parties, it was claimed the improbability of the contract was demonstrated. It was argued, too, that this duplicate paper contained statements in regard to Miss Howland's faithful attendants, false in fact, contrary to her daily expressions of feeling and habits of thought. Much evidence was introduced that, so far from the will being readily made by the aunt in fulfilment of a contract, "a clear understanding," it was executed only after long and persistent importunities of the niece. It was claimed that the draft of the aunt's will, executed January 11, 1862, was not made in 1860 with the niece's, to be afterwards executed, that it was never written until 1862. The paper itself was relied on to show this, and expert testimony brought to prove this date to have been written at the

same time as the body. The unexecuted will, incorporating the "second page," Exhibit 11, contained a blot or erasure of the date, explained by Miss Robinson to have been made because of a change of the day on which it was to have been executed. It is argued that this paper was never prepared before the eleventh day of January, 1862, as it must have been to account for the term "second page," used in the will and elsewhere; but that it was subsequently written by the niece, and that the date was destroyed by acids (traces of which were found on it by experts) for the purposes of the case; an argument most ingeniously met by the complainant's counsel by the suggestion that the ink-bottle getting low was reinforced by the vinegar-cruet, and by the more convincing, if less ingenious, argument, that if Miss Robinson desired to produce a false paper wholly in her own writing, she could have as easily made a fair copy, bearing no marks of erasure, as brought into court one which bore signs of acid on its face.

Letters are produced from Hetty, showing her style to have been the same as appears in the second page. Former wills of the aunt are introduced, in none of which, as in that of 1850, already referred to, did she leave her whole property to the niece, and strong declarations in favor of the one admitted to probate are put in. "I have made it good and strong; Edward Robinson," she said, "would not dare to put down such a man as Dr. Bigelow" (one of the witnesses of this will).

The omission of the father's name from the niece's will was claimed to have been actuated, not by the aunt's advice, but by the taking of the trust-money by the father, which, it will be recollected, occurred in 1860, the year both of the mother's death and the niece's will.

Signature to the Will (No. 1).

Lydia Ann Howland

Signature to "second page" (No. 10).

Lydia Ann Howland

Signature to "second page" (No. 15).

Lydia Ann Howland

Contradiction is made of the placing the papers in the trunk, and of their discovery. Mrs. Brownell, who had constant charge of the trunk and keys, says that Miss Howland wished her to put the yellow envelope (containing Miss Robinson's will, it will be recollected) into the trunk "for Hetty;" that she put in a white paper in 1860, soon after Mrs. Robinson's death; but since that time no other papers, except bills and receipts once a year, and that the yellow paper was put in *after* the white. When and by whom then, it is asked, was the white envelope put into the trunk? Mrs. Brownell and Miss Montague also contradict some of the details of the discovery of these papers, Mrs. Brownell not having been present, according to their account, when the yellow envelope was found.

Testimony is produced to show that the aunt and niece were not together at Round Hills in the summer of 1860, when the alleged contract was made, and the slate so much in use; that Miss Howland only drove there occasionally that summer. The same witness, the hack-driver Pardon Gray, testifies that the complainant told him in reference to the will ultimately proved, of the existence of which she says she was ignorant, "that they need not have been so secret about making the will, for she knew all about it soon after." The conduct, too, of the complainant after her aunt's death, in not referring to any agreement, but in endeavoring to have her aunt's will set aside on other grounds, is much relied on.

Thus, wherever a discrepancy could be discovered, or an improbability pointed out, the defendants have done so; but, after all, their main reliance, and the chief struggle, was over the genuineness of the signatures to the duplicate "second page," Exhibits 10 and 15; and it is for the extraordinary conflict of expert testimony, demonstrating how completely scientific opinion may differ, that this case, after the interest awakened by the magnitude of the struggle has died away, will be most famous in the annals of the law. Here were three signatures of Sylvia Ann Howland: one to her will of 1862, Exhibit 1; one to each duplicate second page, Exhibits 10 and 15. That to the will was confessedly genuine. But it appeared upon superposing the other two over this, that the covering was so exact, letter for letter, stroke for stroke—"10" (the duplicate "second page" given to the niece) somewhat closer than "15" (that kept by the aunt, and found in the trunk)—and that not merely this covering existed, together with identity of all the spaces between the letters and the words, but that the locality on the paper and the distance from the margins of the signatures so nearly coincided, that the defendants, supported by the opinion of some of the best experts in the country, were led to bring forward the theory that this extraordinary coincidence was not the result of chance, but of design. They claimed that these signatures had been forged to these papers by the complainant, by tracing upon the original signature of the will. It was, *a priori*, beyond the bounds of probability, they argued, that this coincidence of precise covering could occur, in short, practically an impossibility; but infinitely incredible, that just the signature the plaintiff wanted should match the only one she had. They claimed that the signatures 10 and 15 bore in themselves marks of tracing, and produced a large number of bills of lading signed by the deceased, none of which, they claimed, bore the characteristics of the disputed signatures.

This issue was fully and squarely met by the complainant's counsel. They answered that, the idea that no two signatures could cover was false in theory and in fact, and they produced signatures of many well-known persons, which they claimed covered better than the signatures of the deceased lady. They met expert by expert. Wall Street and State Street furnished their most eminent judges of handwriting to the one side or the other. The rival "commercial colleges" sent presidents and representatives, each equally positive, and ready to support by oath the truth of their several opinions. The Coast Survey sent on from Washington one of its most eminent members. The science of photography was exhausted in the variety and number of pictures of the disputed signatures. Recourse was had to the magnifying glass. Numberless exaggerated images of the words "Sylvia Ann Howland" were manufactured, and appear upon the files of the court in immense books of exhibits; and not merely of these signatures, but of the many which are claimed to cover as well as the disputed signatures; and of other signatures of the testatrix, of the will itself, of the papers 10 and 15. Learned chemists were called, who gave their judgment of the ink. Skilled engravers, habituated in the art of tracing, pored over the strokes and curves of the letters. Harvard University contributed to the list of witnesses three of its most distinguished names. The most celebrated mathematician of the country was invoked, who stated the doctrine of chances with a precision and solemnity which astounded the uneducated understanding. The learned physician, so famed both in poetry and science, applied his microscope, and gave his opinion. The naturalist, whose name on both continents is second only to Humboldt's, who, as he testified, began natural history as a child, and is to-day a student, gives his analysis with characteristic zeal and earnestness.

The testimony of witnesses developed weeks of laborious preparation. Before they came on the stand, many of these witnesses passed months in the closet, working sometimes ten hours a day, comparing, analyzing, photographing, magnifying, doing every thing that science and experience could suggest, to fit themselves to give a correct opinion. They produced the result of their labors in the elaborate magnified exhibits, which, bound in large volumes, are lasting proofs of their diligence and ingenuity. Not a curve in a letter, not a down stroke, or an up stroke of the pen, not a dot of an *i* or a cross of a *f*, or a waver of the hand, but what has been subjected to the most searching examination under powerful microscopes, while essays are read upon the philosophy of handwriting, in theory and practice. Page follows page of minute criticism of hair-lines, loops, curves, turns, body strokes, and so on, to utter weariness. Yet, after all, with what result?

No slur can be cast upon the integrity of any of these gentlemen. They have no interest in the result of the suit. Their characters are above suspicion. Truth is primarily their object. Did that old woman beyond the grave, sign those two papers? On this side of the grave, the niece alone knows. The niece says she did. But for this, if an untruth, she is to have millions. Can science give her the lie? So scientific men pore over these nine little words for many months. They apply to them

the many instruments that the laboring brains of former scientific men have invented, and the scientific data of past years. Yet, with all this, they stand ranged on the one side and the other, differing from and contradicting one another, not only on the main question of the forgery, but in a thousand more minute but still important particulars, equally confident of adverse opinions, until the brain of the unprejudiced reader of this mass of conflicting opinions swims with confusion, and he asks, with "jesting Pilate," *What is truth?* Thus the result of so much labor of experts,—their skill, their ingenuity, their patience, their anxiety, simply demonstrates to the profession their inutility as witnesses in a court of justice. Fact is untrustworthy enough.

Of a single occurrence a hundred different accounts may be given in good faith by honest spectators. But when we come to opinion, who shall state the limit of discrepancy, or dare to name the number of conflicting theories? Let it not be understood that it is desired to cast reflections upon science, nor upon the curious and ingenious means which it supplied,—unhappily not for the elucidation of this case. Let any one take the testimony of either one or the other side to this controversy, and he will marvel at the precision with which it was possible, by the resources of science, to supply the conclusions which were wanting to facts. Let one read only the evidence of the defendants, and, however little prone to moralize, he will wonder at the appliances of modern art which has detected, both by mathematical demonstration, and by an analysis of handwriting and chemical investigation, very nearly amounting to mathematica demonstration, a hidden crime, and made it as patent as the daylight. This, he will say, is providential. No link is wanting. The discovery of the footprint, the traces of blood, bears no comparison to this. Hereafter, the curious stories of Poe will be thought the paltriest imitations, when real life affords such an instance of the detection of guilt by the unanimous testimony, not of eye-witnesses, but of bankers, photographers, writing-masters, mathematicians, and naturalists. So positive is their testimony, so exact in its details, so nicely does one fact fit the other, and so curiously is each explained and reconciled, that the eye will almost see Hetty H. Robinson holding to the window the genuine document, folding over it the spurious paper, wetting her pencil, and tracing the words, and then covering the pencil tracings with ink.

But let the testimony of the complainant's experts alone be read, and the picture is wholly changed. The providential detections of science become unjustifiable slanders; it is the old woman who has traced, with trembling fingers, her fixed and formal autograph. The genuineness is beyond a doubt, and is patent upon a comparison with the aunt's former undisputed signatures. The signs of tracing are but the nervous trembling of old age; the curious covering, the not unusual result of writing from the wrist, in a cramped position, by an aged woman, unused for many years to write more than her signature.

Who then shall decide when such doctors disagree, or do more than review their testimony, and wonder, on the one hand, at its ingenuity, its research, and its elaboration; on the other hand, at its curious discrepancies, its multifold and manifold contradictions? Take first that of the

defendants, for with them the discussion originates. At the head of their experts, marches *Albert S. Southworth*, one of the earliest photographers in the country, for twenty-five years engaged in this business ; once a teacher of penmanship, and for six or seven years much devoted to questions of hand-writing, a frequent expert in courts of law. The study of these signatures and these enlarged photographs has occupied him for weeks. "The two signatures," he says,—Nos. 10 and 15,—“are simulated signatures of the hand in the standards and in No. 1, and are made up, traced, and copied by another hand from No. 1, as an original, and are not genuine.” He produces magnified riders of transparent paper, superposing the supposedly spurious upon the admittedly genuine signature, to show the exactitude of the covering. He came to this opinion, he says, by being shown the papers in the clerk's office by a perfect stranger, who afterwards proved to be one of the defendants' counsel. He compares the disputed signatures with others of the aunt's admitted to be genuine, also with the writing of the body of the disputed instruments admitted to have been written by her niece, and declares these disputed signatures to have been written, not by the aunt, but by the niece ; and he adds,—

“And my mind would have come to the same conclusion had I not have had any genuine writing of Sylvia Ann Howland's before me. I should say also, with the signatures 10 and 15 alone, I should have considered them simulated without any other writing whatever. Taking either of them separately, I should have believed them simulated from the internal evidence in each ; and taking them with the signatures of Sylvia Ann Howland in either of the three particulars which I have mentioned, alone, with the filling ; and altogether, in either of those three, there is overwhelming evidence, in my own mind that signatures to Nos. 10 and 15 are not genuine.”

He goes over the writings, letter by letter, curve by curve, with enormous detail, and, in comparing the disputed signatures with the filling of the papers in the niece's hand, adds the following curious commentary :—

“Indeed, it is more difficult to find forms and characteristics unlike, and not presenting characteristics in 10 and 15, than it is to see those that are natural and the habit of the hand ; and the whole answer to the question may be, that there is scarcely a point or a place where the hand is not distinctly traced. Not that one of these points or places, or two, or ten, constitute sufficient ground for an opinion ; but in their mathematical arrangement, and absolute harmony in every respect, disconnected from the simulation of the signatures in 10 and 15, they are like the footsteps of an individual, under different circumstances,—sometimes slow and sometimes rapid ; sometimes on a hard path, and sometimes in the sand ; sometimes with the measured tread on the floor, or on tiptoe on the muddy flag-stone ; sometimes in the slipper, in the boot, or in the rubber, or barefoot ; sometimes in the jostling crowd, the measured step to the drum, the whirl of the giddy dance ; and in every other position in which the step or mark could be seen, measured, compared, and recognized,

mathematically. So many combinations of characteristics are circumstantial truths to my mind, making it an absolute demonstration."

John E. Williams, for ten years president of the Metropolitan Bank of New York city, declares 10 and 15 spurious, and "has no doubt whatever of the correctness of the conclusion to which he has come."

Joseph E. Paine, of Brooklyn, an accountant of thirty years' experience, an expert who accomplished the curious feat of the pen, known as the "Emancipation Proclamation," states the signatures 10 and 15 not to be genuine, and to have been undoubtedly formed by tracing in some one of its various methods. When asked as to his confidence in his opinion, he answers, "I should say the next degree to knowing absolutely who did sign them,—seeing them signed. I mean by that I have not a solitary doubt that they are forged or simulated signatures."

George Phippen, Jr., of Boston, for twelve years assistant paying teller of the Suffolk National Bank, declares it impossible for any person to make a signature that shall so closely resemble another, that he has tried his own signature hundreds of times, also the signatures of others, and never found two signatures of his own or of others that would match exactly with each other in every detail; that he has "no possible doubt" of the want of genuineness of 10 and 15.

Solomon Lincoln, formerly cashier, now president of the Webster National Bank, declares that his degree of confidence that the signatures are not genuine amounts almost to moral certainty; that he has frequently tried to write alike for the purpose of making uniform signatures to bank-bills; but always without success.

Charles A. Putnam, a broker and banker of Boston, for twenty-three years connected with banks as clerk, teller, or cashier, pronounces 10 and 15 not genuine, and "has hardly a doubt" on the subject.

George N. Comer, the well-known president of the Commercial College in Boston, who has made, he says, the critical examination and comparison of handwritings a study for twenty-five years past; who has been consulted as an expert in handwriting continually during the whole of that time; who has testified as an expert in various courts of this and other States upwards of two hundred times; and has been consulted in probably a dozen cases, for every one in which he has testified,—declares that 10 was copied by having been placed over 1, and written with a lead pencil wetted, and then written over with pen and ink; that 15 was written over the signature of 1, without the intervention of wetted pencil or similar material; that he is "as confident of this as if he had seen them written;" that the writing of no two persons stains the paper, that is, produces the same microscopical effects, in the same way, and that the ink in 10 and 15 stains the paper in precisely the same way as the body of these papers, and not as the genuine signature in 1; that the same hand wrote 10 and 15 that wrote this filling, and that he gave these opinions with no knowledge of the merits of the case on the side that asked his opinion.

James B. Congdon, treasurer and collector of New Bedford, for thirty-two years cashier of Merchants' Bank of that city, declares it his opinion that it is "utterly impossible for any individual to write his name three

times so that the resemblance may be such as appears in 1, 10, and 15; that he has examined the signatures of eleven different persons, five hundred and seventy-two signatures, rendering necessary thirty-seven thousand and seven hundred comparisons, and found no such resemblance between any two of them; that his conviction is entire and undoubted that they are not the signatures of Sylvia Ann Howland."

William F. Davis, of Boston, broker, formerly clerk in the Suffolk Bank, for twenty years a student of handwriting, has no doubt in his own judgment that 10 and 15 were traced from 1.

Alexander C. Cary, manager of the Boston office of the American Bank Note Company, gives much the same testimony. He declares that 15 slipped in the tracing. He feels certain of all this. There is "no doubt whatever" in his own mind.

George C. Smith, an engraver since 1811, from his experience of over half a century, declares that, assuming 1 to be genuine, the others could not possibly be; that he has never known three signatures so to correspond.

John E. Gavit, of New York, president of the American Bank Note Company of the city of New York,—the principal company in the world,—has never in his experience found two signatures by the same hand absolutely identical, *fac-similes*, and states with a "great deal of confidence," though feeling it to be a "grave case," his opinion of the tracing.

George A. Sawyer, of Boston, a writing-master and student of handwriting, declares it his "conviction" that the signatures to 1 and 15 are false. He says,—

"They are not natural: they are studied. They exhibit great effort to make them look exactly like No 1. Superpose 10 on 1, they will almost perfectly coincide throughout, although there is no line to guide the hand in writing. Match the margins of the papers 10 and 1, and the signatures will superpose; the distance from the margins on either side of the signatures of 10 and 1 are the same on the corresponding sides. There is uniformity in length of signatures and spacing of the letters. No. 1 indicates a trembling hand, but perfectly natural movement. No. 10 shows great effort to imitate No. 1, and although quite successful in some parts, yet fails in others. The effort to imitate a trembling hand exhibits more of a vibratory movement. There is evidence of retouching, and this retouching is apparently done with great care. Nos. 10 and 15 exhibit more firmness of hand than No. 1. It is remarkable that the signatures of 1 and 10 coincide so perfectly without any line to guide the hand. The impression that I received when I first saw the signatures 1 and 10, was, that No. 10 was not natural; I have seen nothing in subsequent investigation to change that impression."

Dr. Charles T. Jackson, the well-known chemist and State Assayer of Massachusetts, familiar with the microscope since 1825, finds upon microscopical examination the signature of No. 10 to consist of two inkings,— "a signature written in pale ink, being covered with a very thick and black and gummy ink."

Lemuel Gulliver, for over twenty years cashier of the National Union Bank, declares 10 and 15 forgeries, and traced from 1. He has great confidence in his opinion.

Professor Eben N. Horsford, formerly professor of chemistry in Harvard College, discovers, upon microscopical examination, signs of double writing in No. 10. He declares it to have been rewritten, or painted, as the expression is. He finds indications of tracing in both 10 and 15.

Finally, *Professor Benjamin Peirce*, formerly of Harvard College, now Superintendent of the Coast Survey, has, with his son, Mr. Charles S. Peirce, also a skilful mathematician, carefully examined the signatures and observed their coincidences. He has the "utmost degree of confidence" that No. 10 is not an original signature. In such marked language does he give his testimony, that the liberty is taken of transcribing a portion of it. After stating in detail his method of calculation, he proceeds,—

"In the case of Sylvia Ann Howland, therefore, this phenomenon could occur only once in the number of times expressed by the thirtieth power of five, or, more exactly, it is once in (2666) two thousand six hundred and sixty-six millions of millions of millions of times, or 2,666,-000,000,000,000,000,000.

"This number far transcends human experience. So vast an improbability is practically an impossibility. Such evanescent shadows of probability cannot belong to actual life. They are unimaginably less than those least things which the law cares not for.

"The coincidence which is presented to us in this case cannot therefore be reasonably regarded as having occurred in the ordinary course of signing a name. Under a solemn sense of the responsibility involved in the assertion, I declare that the coincidence which has here occurred must have had its origin in an intention to produce it. If coincidence is ever of any value as evidence concerning form, figure, or face, it is valid here; and it is utterly repugnant to sound reason to attribute this coincidence to any cause but design. But even here the statement of the case is not closed. There is still an impossibility to be piled upon the immense barrier which has been exhibited. The signatures which were compared together were all written upon ruled lines. The signatures Nos. 1 and 10 were not so written. Had they been so written, the improbability of coincidence would have been just that which I have given. An additional datum is required from observation; namely, the tendency to uniformity of level in the characteristic lines of Sylvia Ann Howland's signature when her writing was not guided by a ruled line. The means of obtaining this datum are meagre. Nevertheless, it is apparent from the irregular curvature of the lower lines of the few of her signatures which I have seen, written in this way, that her uniformity of placing her characteristic lines on a level was not so great as would be expressed by the number one-half; that is, it would not occur half the time with each characteristic line. But even were this the case, a complete uniformity in the level of all the characteristic lines would not occur once in two hundred millions of times. There is another practical impossibility, which is quite independent of that previously obtained. There is still to be introduced the improbability of having the two signatures at the same exact distance from the edge of the paper, which increases the improbability at least ten times, and probably a hundred-fold."

Against this vast mass of testimony it would seem as if no defence could be interposed. It should crush, one would say, by its enormous weight. Yet the complainant's counsel were not daunted. In the first place, to the theory, upon which hangs the reasoning of many of the defendant's witnesses, that no two signatures will ever cover, they oppose a flat denial. They go forth, apparently, into the community, and seek for signatures that will cover; and they are successful,—after how much search or how much disappointment it is not known. But the result must have exceeded their most ardent anticipations.

John Quincy Adams finds among the papers in the study of his grandfather, the President, many returned checks; of these, one hundred and ten are given to Mr. J. C. Crossman, an experienced engraver of Boston. These are carefully compared by him, one with another, and numbered, —making twelve thousand one hundred comparisons. Twelve signatures are selected as being the most similar, and are photographed in a magnified form, with the assistance of Mr. Black, the photographer. Two copies of all are made, one upon transparent paper, so that any one signature may be superposed on any other. These are filed in the case as exhibits, and the accuracy of their covering speaks for itself. The signature is "J. Q. Adams." They certainly show a most striking similarity, both in the formation of the letters and the spaces between both the words and the letters. Crossman, and many other experts, testify at length as to the comparisons. One is found which, in his judgment, shows a more accurate correspondence than 10 over 1. Several better than 1 over 10, or 15 over 1.

In like manner, the checks of Samuel W. Swett, president of the Suffolk National Bank of Boston, are taken: sixty-four given to the expert, four thousand and ninety-six comparisons made of his signature, seventeen enlarged photographs are made, which are treated in the same manner, and show a most remarkable uniformity. The same course is pursued with the signatures of Dr. Clement A. Walker, superintendent of the Boston Lunatic Hospital; Stephen Fairbanks, late treasurer of the Western Railroad; George C. Wilde, clerk of the Supreme Judicial Court; Francis W. Palfrey, counsellor-at-law, and special examiner for the court of the complainant's witnesses; and Joseph B. Spear, a copyist, former clerk to Governor Andrew. These signatures all show a remarkable uniformity, and in some of them the covering appears as remarkable as of those in the case at bar.

The result in general terms is, that several are found which cover as well, or about as well, as 10 covers 1; and very many that cover better than 1 covers 10, or 15 covers 1. By these the complainant's counsel claim to have destroyed the non-covering theory of the defendants, and advance one of their own, which is aptly exemplified in the words of Mr. Wilde: "I should think the uniformity of my signature has increased for the past ten or fifteen years; though, always having written with difficulty, I have written with care."

Not content with this, the complainant's counsel take the signatures of Sylvia Ann Howland upon the bills of lading produced as exemplars of her signature by the defendants, and photograph them, placing them in

succession one below the other, and claim by this means to show a great uniformity in Miss Howland's method of signing her name, also in the length of signatures and spacings of the words. Crossman testifies that one of these covers another almost as well as 10 covers 1; and finds several instances where the covering is better than 15 of 1, or 1 of 10.

Passing to the opinion of experts, the complainant calls *George H. Morse*, a plate engraver, of Boston, of twenty-five years' experience. After an examination of all the papers, including the signatures to the bills of lading, he finds no signs of tracing in 10 and 15, and pronounces them both genuine.

Thomas C. Mullin, a teacher of penmanship, has made the same examination, and believes the signatures genuine. He has seen writings cover quite as well, and would expect this to be the case with people who wrote a cramped or mechanical hand. It would be likely to be the case with a person who had not a good command over the pen, or a free use of their hands, but wrote carefully letter by letter, as a lame man would walk, step for step.

Joseph A. Willard, clerk of the Superior Court for the County of Suffolk, a well-known and highly esteemed expert in handwriting, declares the signatures of 10 and 15 genuine; and has seen signatures cover better, considering all the surrounding circumstances.

Charles French, the principal of French's Commercial and Nautical College, also a well-known and experienced expert of long standing, gives the same opinion, with a lengthy analysis.

William H. Eaton, of another commercial college bearing his name, called frequently as an expert for seventeen years, is convinced of the genuineness of the signatures. "It is quite a common occurrence with me," he says, "to notice that certain classes of writers repeat themselves;" and he distinguishes between people writing from the thumb joint and those writing with an arm motion, who generally write a freer hand, and are subject to more irregularities. A person in ill health, rarely writing, in a cramped position, and propped up, would be, he thinks, apt to repeat herself.

W. W. Crapo, one of the counsel for the complainant, to be sure,—but the only witness called who had seen Miss Howland write,—thinks the signatures genuine.

John A. Lowell, engraver, can see no indications of tracing or of counterfeiting, and believes the signatures genuine. He also testifies, that if 15 had been traced from 1, and slipped in the tracing, at least forty separate slippings would be necessary to account for the differences.

George Pye, a draughtsman, with much experience in tracing, finds no evidence that his art has been called in play.

George Mathiot, since 1850 in charge of the electrotype and photographic division of the Coast Survey, pronounces 15 to be a writing, made by a pen by the same hand that wrote 1, and infers the same of 10. He gives his opinion, that the tracing attributed to Miss Robinson "might possibly have been done by an ingenious card engraver, with his special appliances for tracing, but not by any person who had not united practice with great capabilities." He finds in the exhibits of the signatures of

President Adams, and some of the rest, greater similarities than exist between the genuine and disputed ones of Miss Howland.

J. C. Crossman, already referred to, has a great degree of confidence that the signatures are genuine, based on the resemblances, local and general, of the disputed signatures to those on the bills of lading, some of which bear signs of having been retouched by the writer.

Professor *Agassiz* has subjected the disputed signatures to a most searching microscopic test. Under a compound microscope, with a power exceeding thirty diameters, the paper appeared to consist of "fibres felted together, intercrossing each other in every direction, not unlike a pile of chips pressed together." The action of the ink on these fibres is analyzed and explained with his usual clearness; the thicker portions being accumulated upon the superficial fibres, like mud along the river-side after a freshet, while the more fluid portion has penetrated deeper. Pencil, not being a fluid substance, would have left a mark upon the superficial fibres; of this he finds no trace, nor is the surface of the paper disturbed as it would have been if india-rubber had been used. He declares that the inequality of the distribution of the ink has led to a mistaken theory about the lead pencil. He sees no marks of tracing.

Dr. Oliver Wendell Holmes finds nothing in the disputed signatures, while placed under the microscope, to give indication of the use of two inks, nor any thing to show that either had been traced.

In addition to this, the plaintiff called experts, who pronounced the Voigtlander lens used by the defendants in their photography to be inaccurate; and this, on the other hand, was rebutted by the defendants. Issues were raised as to the color produced in a photograph by certain colors in nature. Evidence was introduced tending to show that the defendants' photographs had been touched with a brush. Miss Alice Cornelia Driscoll, going to Whipple's photograph rooms, to examine some photographs of ladies and gentlemen of the American Baptist Missionary Union, being a young lady who testifies that she is careful in all things to study to show herself approved unto God, finds herself providentially brought into the peculiar circumstances of noticing another young lady, with bonnet and shawl, engaged with a brush over the signature of Sylvia Ann Howland; and she again is contradicted by evidence from this establishment.

Of the large amount of evidence reported more than half, doubtless, was inadmissible, and would have been excluded. One of the eminent counsel expressed the opinion, in argument, that all the testimony drawn from photographs was clearly inadmissible. We are not aware of any decision admitting such testimony upon a question of handwriting. It is hearsay of the sun. This case is an instance of the number of collateral issues raised. The correctness of the lens, the state of the weather, the skill of the operators, the color of the impression, the purity of the chemicals,—these, and many others issues, easily conceivable, would be raised in every case. Again, the competency of the similarity of the signatures of J. Q. Adams, Stephen Fairbanks, and the rest, seems extremely doubtful, as tending to prove that Sylvia Ann Howland's signatures would have the same similarity. True, this is introduced to contradict

assertions of the respondents' witnesses, that no two signatures of the same person would cover; which was a reason given by many of them for their opinion of the want of genuineness of Sylvia Ann Howland's. But in point of fact, how can it be possible to argue one person's liability to reproduce her signature, from the habit of six others selected for this conceded singular peculiarity? It would be as well, as was suggested, to infer one's power of shooting with precision, ploughing a straight furrow, or drawing a straight line from an examination of the performances of others. A variety of collateral issues are raised; it must be shown not only that the person wrote the signature, but under what circumstances he wrote; what was his bodily health and his state of mind; and this must be repeated as to every signature. The book of exhibits of the signatures of John Quincy Adams and the rest does not show the average number of times the signatures of a certain number of individuals selected at hazard—for instance, on a page of a directory or in a college class—would cover; but it merely shows, that after diligent search, and after much selection, signatures can be found that will cover. It certainly contradicts the broad assertion that such a thing has never existed, and is therefore impossible. In short, it shows it possible; but affords no means of judging whether it is probable. But whether this reason of some of the respondents' witnesses for their opinion is sufficient ground for admitting the similarity of J. Q. Adams's signature, on a question of the forgery of Sylvia Ann Howland's, seems doubtful. If this evidence is competent, it certainly would have been admissible for the respondents to have rebutted by introducing photographs *ad infinitum* of the signatures of all the rest of the world; and when would there have been an end to this testimony?

[As no evidence existed that the "second page" ever formed a part of the aunt's will; or that the aunt ever had any knowledge of the complainant's will, found in her trunk; except the testimony of the complainant herself, the Court allowed her examination as a witness, but reserved for the final hearing the question of her competency and admissibility as a witness under section 858 Rev. Stat. U. S. and section 14 Gen. Stats. Mass., chap. 131. The Circuit Court finally refused to admit the complainant's testimony, and dismissed the bill with costs. An appeal was taken, but withdrawn, on a settlement between the parties whereby the complainant received her expenses, costs, and counsel fees. The probate of the will of September 1, 1863, therefore, remained undisturbed, and under the trusts of the will, the complainant received, during her life, the income of about one-half of the estate, in lieu of absolutely owning the whole estate.—ED.]

United States District Court, E. D. Missouri.

UNITED STATES v. BAYLE.

A postal card, on which is written a demand for a debt, coupled with a threat to place the account with a lawyer or law agency for collection, is non-mailable matter under the provisions of the Act of Congress of September 26, 1888.

But a demand for a debt, stating that it is long past due and that the creditor's collector has called for it several times, may be written upon a postal card, if couched in respectful language, and not put in such form as to attract public notice or make it offensive to the person addressed, and such postal card will not fall within the statutory prohibition.

On demurrer to an indictment under Section One of the Act of September 26, 1888 [25 Stat. at Large 496], which provides—

Be it enacted, etc., That the last clause of the second section of "An Act relating to postal crimes, and amendatory of the statutes therein mentioned," approved June 18, 1888 [25 Stat. at Large 187], be, and the same is hereby, so amended, as to read as follows, and to constitute the third section of said Act.

SEC. 3. That all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another may be written or printed, or otherwise impressed or apparent, are hereby declared non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe; and any person who shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, upon conviction thereof, be fined not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court.

George D. Reynolds, U. S. District Attorney.

D. P. Dyer, for defendant.

THAYER, J. December 14, 1889. This is an indictment in three counts, under the Act of September 26, 1888 (25 St. U. S. 496), for depositing postal cards of an alleged non-

mailable character in the mails. The postal cards in question were each addressed to John Greb, 2201 Franklin avenue, St. Louis, and are of the following tenor—

‘ST. LOUIS, April 12th, 1889.

“Please call and settle account, which is long past due, and for which our collector has called several times, and oblige,

“Respectfully,

ST. LOUIS PRETZEL CO.”

“ST. LOUIS, April 18th, 1889.

“You owe us \$1.80. We have called several times for same. If not paid at once, we shall place same with our law agency for collection.

“Respectfully,

ST. LOUIS PRETZEL CO.”

“ST. LOUIS, May 1st, 1889.

“You owe us \$1.80, long past due. We have called several times for the amount. If it is not paid at once, we shall place same with our lawyer for collection.

“Respectfully,

ST. LOUIS PRETZEL CO.”

Section One of the Act of September 26, 1888, provides: [here follows a quotation of the first half of the section, to the words “not be conveyed in the mails.”]

If the postal cards in question are non-mailable, it is because they contain language of a “threatening character,” within the meaning of the law, or because they contain language “calculated * * * and obviously intended to reflect injuriously upon the character or conduct” of the person to whom they were addressed. It is clear that they fall within no clause of the statute unless they are within the clauses last referred to. Two of the cards, as it will be observed, contain a demand for the payment of money alleged to be due, and a threat to place the demand in the hands of a lawyer for collection, if not paid at once. The question, therefore, arises whether Congress intended to prohibit the mailing of postal cards containing or on which are written threats of that kind. The language of the statute is very general, and certainly may be construed as a prohibition against mailing postal cards which contain threats to bring suits if debts are not paid, as well as being a prohibition against mailing cards containing threats of personal violence

or threats of any other character. It is most probable, I think, that Congress intended the Act should receive that construction.

It is a well-known fact that prior to the passage of the law some persons had made a practice of enforcing the payment of debts by mailing postal cards or letters bearing offensive, threatening, or abusive matter, which was open to the inspection of all persons through whose hands such postal cards or letters happened to pass. In some quarters the practice alluded to of sending communications through the mail that were both calculated and intended to humiliate, and injure the persons addressed in public estimation, had become one of the recognized methods of compelling the payment of debts. Congress evidently intended by the Act of September 26, 1888, to utterly suppress the practice in question. It has not only declared that libelous, scurrilous, and defamatory matter written on postal cards, or on envelopes containing letters, shall not be disseminated through the mails, but that no matter of a "threatening character," or that is even "calculated * * * and * * * intended to reflect injuriously upon the character or conduct," shall be so disseminated, if written on postal-cards, or on the envelopes of letters, and hence is open to public inspection. I conclude that a postal card on which is written a demand for the payment of a debt, and a threat to sue, or to place the demand in the hand of a lawyer for suit, if the debt is not paid, is now non-mailable matter. Henceforth persons writing such demands and threats must inclose them in sealed envelopes, or subject themselves to criminal prosecution. The demurrer to the second and third counts is not well taken, and is therefore overruled as to those counts.

The language employed in the postal card described in the first count is not of a threatening character, and, in my opinion, no jury would be warranted in finding, in view of its contents, that it was obviously intended by the writer to reflect injuriously on the character or conduct of the person addressed, or to injure or degrade him in the eyes of the

public. It is true that it contains a demand for the payment of a debt, and says it is long past due, and that a collector has called several times; but it is couched in respectful terms, and no intent is apparent to put it in such form as to attract public notice, or to make it offensive to the person addressed. Congress has not declared that postal-cards shall not be used to make such demands, and a construction of the Act ought not to be adopted that will unnecessarily restrict their use for business purposes. The card in question cannot be held to be non-mailable, without being overcritical and extremely punctilious in the choice of language which men may lawfully use in their daily transactions. The demurrer is accordingly sustained as to the first count.

The Act of Congress of June 18, 1888 (25 U. S. Stat. at Large, ch. 394, sec. 2), provided that "all matter otherwise mailable by law upon the envelope or outside cover or wrapper of which, or postal card, upon which indecent, lewd, lascivious, obscene, libelous, scurrilous, or threatening delineations, epithets, terms, or language, or reflecting injuriously upon the character or conduct of another, may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor be delivered from any post-office nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails, for the purpose of circulating or disposing of or of aiding in the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall, for each and every offense, be fined not less than \$100, nor more than \$5000, or im-

prisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court."

The same Congress, by Act of September 26, 1888 (25 U. S. Stat. at Large, ch. 1039, sec. 2), under which the indictment in the principal case was framed, amended the Act of June 18, 1888, by adding to the adjectives used in the latter Act as descriptive of the delineations epithets, terms or language which would render unmailable the matter upon which they appeared, the word "defamatory," by substituting for the words "reflecting injuriously" the following: "calculated by the terms or manner or style of display, and obviously intended, to reflect injuriously," and by inserting after the words "written or printed," the words "or otherwise impressed or apparent." The intention of the Act of September 26, 1888, was evidently to lay down a more stringent rule and to close up some loop-holes which had been discovered in the more general terms of the earlier Act, through which offenders might find means

of escape. At the same time the punishment prescribed by the June Act was reduced by that of September to a fine of not more than \$5000, or imprisonment for not more than five years, or both, and no minimum penalty was fixed.

In *U. S. v. Barber* (U. S. C. Ct., D. Neb., 1888) 37 Fed. Repr. 55, it was held by DUNDY, J., that the Act of June 18 was repealed by that of September 26, and that a conviction under the former Act for an offense committed between the two dates, could not be sustained. This legislation, the Court adds in its opinion, "seems to have gone further than Congress has ever before ventured in that direction. New offenses have been created, and new penalties have been prescribed for old offenses."

In *U. S. v. Smith* (U. S. C. Ct., D. Ky., 1882), 11 Fed. Repr. 664, the legislation of Congress upon the subject of non-mailable matter is reviewed as follows: "The first Act upon this subject was approved March 3, 1865, and in that Act the language was 'no obscene book, pamphlet, picture, paper, writing, print, or other publication of a vulgar and indecent character.' The next Act was approved June 8, 1872, and provided that 'no obscene book, &c., or other publication of a vulgar or indecent character, or any letter upon the envelope of which, or postal card, upon which, scurrilous epithets may have been written or printed, or disloyal devices printed or engraved, shall be carried in the mail.' The next Act was March 3, 1873, and that provided 'no obscene, lewd, or lascivious book, &c., or other publication of an indecent character * * * nor any written or printed card, circular * * * upon which scurrilous

epithets may be * * * shall be carried in the mails. Section 3893 of the Revised Statutes provided that envelopes and postal cards upon which 'indecent or scurrilous epithets are written or printed should be non-mailable.' It will be noticed, from this review of the legislation of Congress, that the Act of 1873 omitted the words 'disloyal devices,' which were in the Act of 1872, but retained the word 'scurrilous,' which was used in the Revised Statutes, but that the Act of 1876 omitted the word 'scurrilous' and the law is now substantially as originally enacted in 1865." This Act of July 12, 1876, which excluded from the mails envelopes and postal cards "upon which indecent, lewd, obscene, or lascivious delineations, epithets, terms or language, may be written or printed," remained unchanged until the amendatory Acts of 1888, which have been cited at the beginning of this annotation.

The constitutional power of Congress to designate what shall be carried in the mail and what excluded, has been expressly affirmed by the Supreme Court in *Ex parte Jackson* (1877), 96 U. S. 727; S. C. 17 AMERICAN LAW REGISTER, 596, a case arising under U. S. Rev. Stat. Sect. 3894, and the amendatory Act of July 12, 1876 (19 Stat. at Large, 90), which forbid the carrying in the mails of any "letter or circular concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes." Mr. Justice FIELD there says: "The power vested in Congress 'to establish post-offices and post-roads, has been practically construed since the foundation of the government, to authorize not merely the designation of the routes over which

the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. The validity of legislation prescribing what should be carried, and its weight and form, and the charges to which it should be subjected, has never been questioned. What should be mailable has varied at different times, changing with the facility of transportation over the post-roads. At one time, only letters, newspapers, magazines, pamphlets and other printed matter, not exceeding a prescribed weight, as well as books and printed matter of all kinds, are transported in the mail. The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement, a distinction is to be made between different kinds of mail matter, between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open, to inspection, such as newspapers, magazines, pamphlets and other printed matter purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail

are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution * * * Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways; as from the parties receiving the letters or packages, or from agents depositing them in the post-office, or others cognizant of the facts. And as to objectionable printed matter, which is open to examination, the regulations may be enforced in a similar way, by the imposition of penalties for their violation through the courts, and, in

some cases, by the direct action of the officers of the postal service. * * * In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals. * * * All that Congress meant by this Act [Act of March 3, 1873] was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries, institutions which are supposed to have a demoralizing influence upon the people. There is no question before us as to the evidence upon which the conviction of the petitioner was had; nor does it appear whether the envelope in which the prohibited circular was deposited in the mail was sealed or left open for examination. The only question for our determination relates to the constitutionality of the Act; and of that we have no doubt."

In *U. S. v. Bennett* (U. S. C. Ct., S. D. N. Y., 1879), 16 Blatch. 338, the constitutionality of the Acts of Congress declaring unmailable "obscene, lewd or lascivious" matter, was called in question, but Justice BLATCHFORD, then Circuit Judge, held that the question had been "definitely settled by the decision of the Supreme Court in *Ex parte Jackson*," *supra*. "That decision," the Court said, "related to a statute excluding from the mails letters and circulars concerning lotteries, but the views of the Court apply fully to the present case." The same views apply with equal apt-

ness to the Acts of Congress now under discussion. There can be no doubt as to their constitutionality.

The main questions that will arise under this legislation will be as to what "delineations, epithets, terms or language" fall within the statutory prohibition. The descriptive words used in the Act of September 26, 1888, are as follows: "of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another." The meanings of the adjectives "indecent," "lewd," "lascivious" and "obscene," were well settled, prior to 1888, in numerous prosecutions under the postal laws then in force. In *U. S. v. Bennett*, *supra*, Judge BLATCHFORD held, after a careful and thorough consideration of the meaning of these words, that the test within the meaning of the statute is, "whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall." This case has been generally accepted as a correct interpretation of the statutory language, and the test laid down has been frequently applied by other courts: *U. S. v. Britton* (Commissioner's Ct., S. D. Ohio, 1883), 17 Fed. Repr. 731; *U. S. v. Bebout* (U. S. D. Ct., N. D. Ohio, 1886), 28 Id. 522; *U. S. v. Wightman* (U. S. D. Ct., W. D. Pa., 1886), 29 Id. 636; *U. S. v. Slenker* (U. S. D. Ct., W. D. Va., 1887), 32 Id. 691.

"Libelous" is another word with a long settled technical legal meaning, which it is unnecessary to con-

sider here. "Defamatory" has also a settled meaning. "Words which produce perceptible injury to the reputation of another are described as defamatory:" Anderson's Dict. of Law; Odgers on Libel and Slander, 1. "By defamation is understood a false publication calculated to bring one into disrepute:" Cooley on Torts, 193. "Scurrilous," however, is a new word to the law. It is defined in none of the law dictionaries, nor in any reported case. It was originally used, as already stated, in the Acts of Congress of June 8, 1872, and March 3, 1873, and in the Revised Statutes, but was omitted from the Act of July 12, 1876. Webster defines scurrilous as "containing low indecency or abuse; mean; foul; vile; obscenely jocular." In *U. S. v. Smith* (U. S. C. Ct., D. Ky., 1882), 11 Fed. Repr. 664, the words "d-d scoundrel and rascal," are recognized as coming within this term. "Threatening," as used in these Acts, also requires judicial definition. Anderson's Dict. of Law defines a threat to be "a menace of destruction or injury to one's life, reputation or property." Whether any threat whatever, however mild, if written upon an envelope or postal card, will render the writer liable to the penalties prescribed by Congress, has not yet been decided. If the language of the statute is to be literally interpreted, this must be the construction placed upon it.

In addition to these adjectives, descriptive of non-mailable matter, the prohibition is extended by the Act to language, etc., calculated and intended "to reflect injuriously upon the character or conduct of another." These broad words seem to cover an immense

field, which was not reached by the earlier statutes. It was evidently the intention of Congress to absolutely close the mails to all unsealed matter which was not merely of a character to offend the instincts of propriety and decency, but which was calculated in any way to bring another person than the writer into disrepute or lower him in the esteem of those before whose eyes such matter might happen to come. The truth of the allegations makes no difference, nor does the Act confine the forbidden references to the person addressed. Language relating to a third party is equally within its penalties.

The Act under consideration is of such recent date that there have as yet been but few reported decisions construing it.

In *U. S. v. Olney* (U. S. D. Ct., W. D. Tenn., 1889), 38 Fed. Repr. 328, the defendant wrote upon a postal card as follows: "*Mr. Editor*: I thought that you was publishing a paper for the wheel, but I see nothing but rotten Democracy. I am a Republican and a wheeler, and you can take your paper and Democracy, and go to hell with it." The Court declined to charge, as a matter of law, that these words were scurrilous within the meaning of the Act, but left the question to the jury, subsequently sustaining a verdict of guilty.

In *U. S. v. Davis* (U. S. C. Ct., W. D. Tenn., 1889), 38 Fed. Repr. 326, the exact language upon the postal card is not contained in the report of the case, but sufficiently appears from the opinion of the Court (HAMMOND, Ct. J.), which was as follows: "Since the extension by this Act of former statutes on this subject, there can be no doubt that that which is written on

postal cards must be clean and decent, and wholly free from the objections embodied in the language which has been quoted from the Act of Congress. Of course the courts must reasonably construe the words of the Act, and not allow a hypercritical judgment to take advantage of the elasticity of the language used by Congress, necessarily so general in its description of the offense, by bringing within the Act words or thoughts that are only rude, impolite, or not in good taste according to the standard of decency prescribed by the purists in language and thought. But, on the other hand, obvious indecency of thought or expression, according to the common sense, should not escape the penalty of this statute, nor that which obviously is calculated and intended to reflect injuriously upon the character or conduct of him who complains or is mentioned in the writing. And not only may the precise words be weighed in determining the question, but the whole context of the writing, and its evident spirit and tone, as they 'display' the meaning of those words, may be looked to by the court and jury. Inasmuch as the Act does not include profane language in its description of the offense, except as it may be embraced in the other terms used by Congress, and since in the common understanding the word 'damned' is called 'profanity,' it may be doubted if the use of that word was intended to be punished always. But this writer says: 'You can order the car back, and be damned.' In connection with the next phrase, which for sake of decency I shall not quote, although they have no dependence upon each other, and in connection with the whole writing in its tone

and spirit, it is both 'indecent' and 'scurrilous' in the sense of the lexicographers, as well as the common understanding of its use. The next phrase above referred to is so vulgar as to admit of no doubt of its indecency, and the writer knew it to be so, and confessed by the use of only an initial letter for the most offensive word. If it be only 'alang,' still it is of that coarse, gross and essentially vulgar kind, that it cannot be placed upon a postal card without offending all sense of decency, even among the commonest and coarsest of men, and the use of all such phrases is prohibited by this new Act of Congress. Again, the writer says: 'You are sharp, all of you are on the beat.' This, again, may be 'alang," but it is calculated, and obviously intended, to reflect injuriously upon the character and conduct of the addressee. Finally, he says: 'Tell that Radical to send my book back as he agreed.' To those familiar with the bitterness of current political strife and its evolution of distasteful epithets, there will be no doubt that this one was intended for opprobrium of a severe kind, innocent as the epithet seems to common speech, and it was thought by the writer to be 'defamatory' unquestionably.

"If the subject matter of this writing were political, having in view the almost unrestrained license in the use of defamatory epithets in political writing of almost every kind, except the very highest grade, and the fact that such epithets, which in the beginning are intended to denote ignominy and turpitude, become in the process of political conflict, by a process of development, badges of honor and distinction, and are cheerfully ac-

cepted as such, I should say that this phrase did not come within the Act of Congress and was blameless, like 'Abolitionist,' 'Black Republican,' 'Copperhead,' 'Carpet-Bagger,' 'Scalawag,' 'Rebel Democracy,' 'Confederate Brigadier,' 'Bourbon,' 'Free Trader,' 'Tariff Robber,' 'Mugwump,' and the like. But the subject-matter of this writing is the return of the patent model of a car of some kind about which the writer was angry and ugly in his temper, and about which he writes 'indecently,' 'scurrilously,' with evident purpose to defame and injuriously reflect upon the conduct of his correspondent. The commonplace and excessively vulgar style of the writing does not relieve it from its criminal character under this statute. One can be commonplace, and even vulgar, without being indecent and defamatory in the legal sense of the statute, as one may be either of these, or otherwise may violate the statute, without being commonplace or vulgar. That which shocks the ordinary and common sense of men as an 'indecentcy' is the test, as it is also with the other descriptive terms of the Act."

The principal case deals with an attempt to collect a debt by sending a communication through the mail by postal card, calculated and intended to humiliate and injure the persons addressed in public estimation. The Court there recognizes the fact, which is shown by the Congressional debates upon the subject; that one, if not the main, intention of the Act was to utterly suppress the "practice of enforcing the payment of debts by mailing postal cards or letters bearing offensive, threatening or abusive matter, which was open to the inspec-

tion of all persons through whose hands such postal cards or letters happened to pass." The Act, says Judge HAMMOND, was "instigated, as we all know, by the use of the mails by money collecting agencies to compel by such threats, designs and offensive epithets, delinquent debtors to pay their delayed debts:" *U. S. v. Huggell* (U. S. C. Ct., N. D. Ohio, 1889), 40 Fed. Repr. 636, 643. But the principal case holds with much reason that the intention was only to exclude from the mails matter which was of an offensive nature. A mere dun, couched in proper language, may still be made upon a postal card, without rendering it non-mailable. If the dun, however, is coupled with a threat of suit, or even of placing the claim in the hands of a law agency or lawyer, it falls within the statutory prohibition.

Under Section 3893 of the Revised Statutes, as amended by the Act of July 12, 1876, the mails were open to all communications for the purpose of enforcing the collection of debts, however abusive or threatening their language might be, provided it was not of an impure or immodest character. Thus, where a collector mailed his notices in an envelope, upon which was printed: "The Collector of BAD DEBTS, I am looking for an OLD BILL. The DEAD-BEAT COLLECTOR hires me to look them up,"—and followed this up with a postal card, upon which was printed: "Sir: Considering how near you can come to fill a bill, I have decided to post you on all the DEAD-BEAT lists I know of in the city, and have accordingly given the different agencies a chance at you,"—the Court (NELSON, J.) held that no offense had been committed.

Ex parte Doran (U. S. D. Ct., D. Minn., 1887), 32 Fed. Repr. 76. But it has been recently held by BUTLER, J., in the case of *U. S. v. Barnum* (U. S. D. Ct., E. D. Pa., May 24, 1890), that the sending of the notice of a claim in an envelope upon the outside of which was printed "DEAD-BEAT AGENCY," was a violation of the Act of September 26, 1888.

It was stated when the last mentioned Act was reported to the

Senate, that an attempt had been made by certain collection agencies to evade the prohibition of the Act of June 18, 1888, by using a transparent envelope, through which their objectionable language, printed in bold characters, could easily be read. To defeat this scheme, the words "or otherwise impressed or apparent," were inserted in the amendatory Act.

JAMES C. SELLERS.

Supreme Court of Wisconsin.

GRANT v. DIEBOLD SAFE AND LOCK CO.

The consideration of a contract between two parties for the benefit of a third party is the consideration for the promise to the third party.

In contracts made between two parties for the benefit of a third person there is the same privity as that between the promisor and the promisee in any case, and such third party may bring action thereon in his own name.

Appeal from the Circuit Court of Ashland County.

Lamoreux & Gleason for appellant.

Dockery & Kingston for respondent.

ORTON, J., May 20, 1890. The plaintiff is the assignee of his partner's interest in the contract and therefore I will speak of him as the contracting party. The plaintiff entered into a written contract with Ashland County to build a county jail, so far as the wood work and masonry were concerned, September 7, 1887, in which it was agreed that the county of Ashland should not be liable in any manner for, or on account of, any damage or delay caused by any other contractor on said building, but the plaintiff should look solely and exclusively to said other contractor for remuneration for any such damage caused by such other contractor's delay or otherwise. The defendant, a foreign corporation, on the same day entered into a written contract with said county to do the iron-work on said building, and in such time as not

in any way to delay the builder of said jail. After so setting out the contracts, the plaintiff avers in his complaint that he was the builder of said jail referred to in said last-mentioned contract, and that the defendant knew of these provisions of the contract with the plaintiff, and knew that he could not look to the county for any delay caused by any other contractor, and that he must look to such other contractor therefor, and that said provision in the defendant's contract was made for the benefit of the plaintiff.

There is an averment in the complaint that the defendant, knowing the provisions of the contracts aforesaid, and in view thereof, promised and agreed with the plaintiff that it would be responsible for any and all damages which might be caused the plaintiff by reason of its delay in constructing the iron-work of said jail according to the provisions of its contract with said county, or otherwise. This last averment would seem to be a general conclusion from the foregoing, and not a part of the written contract, or an independent agreement of the defendant, and so the learned counsel of the respondent treat it in their brief. But the learned counsel of the appellant insist in their brief that such special promise and agreement were actually made by the defendant. At all events, we shall treat the cause of action as depending upon the stipulations of the written contracts. The breach is that the defendant did not construct the iron-work for said jail in the time agreed upon, and thereby greatly delayed and hindered the plaintiff in his part of the work upon said jail, so that the plaintiff was obliged to carry on his part of the work upon said jail at unreasonable times and in small parts, and at great additional costs and expenses, to the plaintiff's damage in the sum of \$1,213.10. Judgment is demanded for such amount. This is substantially the complaint. The court sustained a demurrer to the complaint, on the ground that it stated no cause of action, and this appeal is from such order.

From the fact the defendant knew of this peculiar provision of the plaintiff's contract, that he should look to the defend-

ant for any damages for delay caused by the defendant, and not to the county, when it entered into its contract with the county not to delay the plaintiff in his part of the work, the two contracts in these respects should be construed together as having direct relation to each other, if not as one contract. In this way the intention of the parties by these provisions is apparent. The county evidently wished to avoid all liability and litigation on account of delays of the plaintiff by the defendant, and make the defendant directly liable to the plaintiff therefor. If the defendant caused delays of the plaintiff's work by failure to do its work in proper time, the county would be liable to the plaintiff therefor, and the county could hold the defendant responsible therefor. It is therefore provided that the defendant should be directly liable to the plaintiff instead of the county, and the county should be exempt from liability. In this view, if the plaintiff's damages had been liquidated when these stipulations were made, the case would be like *Kimball v. Noyes* (1864), 17 Wis. 695, where A. entered into a written contract with B. to pay B.'s debt to C., and it was held that C. could maintain an action against A. in his own name. It is also like *Cook v. Barrett* (1862), 15 Wis. 596, where A. owes B., and C. owes A. the same amount, and it was agreed by and between all the parties that B. should release his debt against A., and look to C. alone for payment. It was held a valid contract, and that B. could recover against C. In this case, calling it a legal liability instead of a debt, the plaintiff released the county, and agreed to look to the defendant alone, and the defendant agreed to become responsible to the plaintiff. Why is it not a valid agreement between them all?

But there is another principle equally well established, and that is that a person may recover on an agreement made with another for his special benefit. To illustrate by cases in this court: If one sells chattels to another, and agrees to pay all liens upon them, the persons holding such liens may enforce them against the vendor, because the promise was made for their benefit, although not parties to the agreement: *Kollock v. Parcher* (1881), 52 Wis. 393. Where one sells his

land and personal property to another, and the vendee agrees to pay part of the consideration by paying all the debts of the vendor, any holder of any such debt may sue the vendee therefor, and thus avail himself of his promise to the vendor made for his benefit: *Bassett v. Hughes* (1877), 43 Wis. 319. Once for all, the principle laid down in this case, and applicable to all like cases, is: "It is settled in this State that when one person, for a valuable consideration, engages with another [by simple contract or by covenant] to do some act for the benefit of a third person, the latter may maintain an action against the former for breach of such engagement:" *Cotterill v. Stevens* (1860) 10 Wis. 422; *Putney v. Farnham* (1870), 27 Wis. 187; *McDowell v. Laev* (1874), 35 Wis. 171; and the cases *supra*, and other cases cited by appellant.

Is this principle applicable to this case? The learned counsel of the respondent contends that it is not, because there is (1) no consideration for the engagement of the defendant not to injure the plaintiff by delays in its iron-work on the jail; and (2) no privity between the parties. In the cases cited above, the consideration in one was the purchase money of the chattels, and in the other the personal property and the land sold; in the first for the vendor to pay the liens, and in the other for the vendee and grantee to pay the debts of the vendor and grantor. In all such cases the consideration of the promise is the same as that for any other stipulation of the contract. The consideration of the contract between the two parties for the benefit of a third party is the consideration for the promise to the third party. The defendant, in consideration of the money it was to receive, agreed to do the iron-work of the jail; and agreed further, for the same consideration, to do it in a particular manner and time, so as not to delay and damage the plaintiff. It was a similar consideration between the plaintiff and the county for the plaintiff's release of the county for the delays of the defendant, and for his promise to look to the defendant alone for his damages on account of such delays. Knowing this, the defendant made its agreement for the plaintiff's benefit, in-

stead of the benefit of the county, in consideration of what it was to receive from the county on its contract. As to the privity of the parties, there is the same privity as that between the promisor and the promisee in any case, and the same privity as in all the above cases. It is by no means certain that the defendant would not be liable to the plaintiff, the other contractor on the job, if it should injure him by unnecessary delays in doing the iron-work, without any direct promise not to do so. In such a case there would be a conjunction of wrong and damage or injury which is the basis of liability, and constitutes a good cause of action. But this is aside from this case. We are clearly satisfied that the complaint states a good cause of action, and is not liable to the demurrer.

The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

No principle of law is better established than that which declares that all contracts not under seal must have a consideration to support them, and that the parties must be in privity with each other. Notwithstanding this, there is perhaps no question which has oftener occupied the attention of the courts than that of consideration and privity of contract, and especially is this so in cases similar to the principal one, wherein the rights of third parties to sue thereon are brought into question.

In the case of an ordinary contract between two persons, for the sale and purchase of an article, very little difficulty arises upon these questions, for, as regards the consideration, it matters not how slight the benefit may be, so long as it is of some value in the eye of the law, provided the transaction be otherwise free from fraud and imposition: *Sprangler v. Springer*

(1854), 22 Pa. 454; *Pierce v. Fuller* (1811), 8 Mass. 223.

When, however, the question arises as to the right of a third person, not a party to the original contract, to sue thereon, difficulties arise and it is by no means an easy matter to distinguish between and define, what cases come within the rule, and what within its exceptions. The rule was not definitely settled in England till the year 1861 when the case of *Tweddle v. Atkinson*, 1 B. & S. 393, came before the Court, and Justice WIGHTMAN stated the law to be "now well established that no stranger to the consideration can take advantage of a contract although made for his benefit." In this opinion, Justices CROMPTON and BLACKBURN concurred, the former saying:—"The modern cases have * * overruled the older decisions; they show that the consideration must move from the party entitled to sue upon the contract.

It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage and not a party to it for the purpose of being sued."

There would, however, seem to be an exception to the rule, even in England, in the case of money had and received. Yet the mere fact of A having sent money to B, to be paid by him to C, does not of itself impose such liability upon B to pay it to C as will entitle the latter to sue therefor in his own name; but if there is any assent on B's part, either express or implied, that he will pay or hold the money to C's use, then the action lies: *Lilly v. Hays* (1836), 5 A. & E. 548.

Upon this point, however, the authorities in this country differ. Mr. Justice STORY in his work on contracts (§552), after stating that the English rule is against the right of a third party, says: "In America, the decisions have been conflicting on the point; but the tendency of the courts is in the same direction." He cites *Exchange Bank v. Rice*, *infra*, and *Griffith v. Ingledew* (1821), 6 S. & R. (Pa.) 429, in support of his statement. Mr. Parsons is however of the opposite opinion, for he says: "In this country, the right of a third party to bring an action on a promise made to another for his benefit, seems to be somewhat more positively asserted; and we think it would be safe to consider this a prevailing rule with us; indeed it has been held that such promise is to be deemed made to the third party if adopted by him, though he was not cognizant of it when made." He cites *Lawrence v. Fox*, *infra*, and *Steman v. Harrison* (1862), 42 Pa. 49, in support of his conten-

tion: Par. Contracts, 468. This latter case was decided upon a well-known principle of law, that a promise to accept a bill for a fixed amount is equivalent to an acceptance, not only as to the drawer, but as to every party who takes the bill on the faith of such promise. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill.

Notwithstanding this diversity of opinion among the text-book writers, they all state the general rule upon the right of a person to sue upon a contract to be that the obligation is, under ordinary circumstances, confined to the parties, and cannot be enforced by third persons: Hare, Contracts 193. There must be privity of contract between the plaintiff and the defendant, for, says Justice METCALF in *Mellen Adm'r v. Whipple* (1854), 1 Gray (Mass.) 317: "A plaintiff in an action on a simple contract, must be the person from whom the consideration of the contract moved, and * * a stranger to the consideration cannot sue on the contract."

Many cases are to be found upon the subject, but they are not all reconcilable with one another. They all support the rule as laid down in *Mellen v. Whipple*, *supra*, but admit of many exceptions thereto. The inconsistency would seem to lie in the action of *assumpsit*, which had its origin in *torit*, upon the ground that one who is injured by another has his action to recover damages, although a stranger, and becomes entitled by acting on the inducement held forth: Hare, Contracts 193.

In the case of an ordinary contract by A with B, for a consideration, to pay B's debt to C, there is

an absolute contract entered into between A and B, but to it C is not an original party, and the question arises, how can C, who is not privy to such contract, sue A upon his promise, made upon a valuable consideration, for the debt owing to him by B? Clearly so far as A and B are concerned, B is relieved from the payment of such debt, and could bring suit against A, if, through his breach, B should be compelled to pay. But where does C's right come in? Does it spring directly from the contract itself? Some cases have gone so far as to hold that such is the case, that the right does spring from the contract, and for this reason, that B in making the contract made it for C if he chose to accede to it, and that all that C has to do is to ratify or assent to it, which he may do by bringing action thereon. Now if such be the case, how does C stand with regard to B? It is a well established principle of law that a party must ratify or assent to the contract as made. He cannot assent to it and yet dissent from its terms. It therefore follows that if A by the contract released, or rather relieved, B from all liability to C, the latter in assenting to such contract releases B from all liability and agrees to look to A wholly.

This theory is contended for in *Warren v. Batchelder* (1845), 16 N. H. 580, where the defendant was indebted to one Dow upon a promissory note, and Dow was indebted to the plaintiff, who had brought an action and summoned the defendant as trustee. Dow requested defendant to pay the debt and costs to the plaintiff out of the money due upon the note, which defendant promised to do and paid the balance to Dow, who surrendered

the note. Plaintiff afterwards requested defendant to pay him the money, which he refused to do. In an elaborate opinion, wherein he examines the cases upon the question, Justice Woods says, "The facts before us present a case of money had and received by the defendant to the use of the plaintiff. And provided the plaintiff is so far a party to the arrangement as to be entitled to receive the money, he may, upon the general principle of the cases cited, maintain this action. But if before commencing suit, he was no party to the arrangement, either by an original participation in it or by a subsequent assent to it and adoption of its provisions, he does not stand in such privity with the defendant as to be entitled to maintain the action: But the money having been deposited with the defendant for the purpose of paying the debt which Dow owed to the plaintiff, the assent of the plaintiff to that arrangement, and his acceptance of that provision made for the payment of his demand, whether such assent and acceptance were contemporaneous with the acts of the other parties * * * or subsequent * * * must operate to discharge the debt for which it was designed to provide, unless there should be cause for holding that the provision was merely collateral. * * * The deposit by a debtor with a third party for the payment of his debt, and the promise of him with whom the money is deposited, to pay the same to the creditor, together with the assent of the creditor to the arrangement, and his acceptance of the provision which is made by it for securing the payment, his claim must be deemed and taken to be discharged and paid, and a new debt and a new

debtor adopted in the place of the old." The case of *Clough v. Giles* (1886) 64 N. H. 73, is to the same effect.

Another view of the question has, however, been taken, which looks upon the contract between A and B as imposing a duty upon A to pay B's debt to C, from which the law will imply a promise in favor of C. Here the duty and the promise must be equal to, or correspond with each other. What is the duty imposed on A, and where is the implied promise? The duty is to pay B's debt to C instead of B and so relieve B from all liability, and the implied promise arises between A and C, for if C sues A upon the promise made by A to B, (which is impliedly made with C) he must sue him as liable instead of B and release B.

The case of *Bohanan v. Pope* (1856), 42 Me. 93, follows this principle. It was a case in which one Whitney had a contract with the defendant as to the hauling of logs. Plaintiff was employed by Whitney to haul and cut the logs, and not being paid brought an action against the defendant to recover the amount due him. Justice MAY, in delivering the judgment of the Court, proceeded as follows:—"It is undoubtedly true, as a general proposition, that no action can be maintained upon a contract, except by some person who is a party to it. But this rule of law, like most others, has its exceptions; as, for instance, where money has been paid by one party, to a second, for the benefit of a third, in which case the latter may maintain an action against the first for the money. So, too, where a party for a valuable consideration stipulates with another, by simple contract, to pay

money or do some other act for the benefit of a third person, the latter, for whose benefit the promise is made, if there be no other objection to his recovery than a want of privity between the parties, may maintain an action for a breach of such engagement." He relied upon the language of Justice BIGELOW, in the opinion of the Court in *Brewer v. Dyer* (1851), 7 Cush. (Mass.) 337, which reads thus:—"It [the rule] does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate; nor upon the reason that the defendant, by entering into such an agreement, has impliedly made himself the agent of the plaintiff, but upon the broader and more satisfactory basis, that the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

In support of the contention that if the third party sues the promisor he thereby releases the person primarily liable; Justice MAY in his opinion in *Bohanan v. Pope*, *supra*, says: "While the law does this in favor of a third person, beneficially interested in the contract, it does not confine such person to the remedy which it so provides; he may * * if he choose, disregard it and seek his remedy directly against the party with whom his contract primarily exists. But if he does so, then such party may recover against the party contracting with him, in the same manner as if the stipulation in the contract had been made directly with him and not for the benefit of a third person. The two remedies are not concurrent but elective, and

an election of the latter implies an abandonment of the former." To the same effect, *Todd v. Tobey* (1848), 29 Me., 219; *Molloy v. Munuf. Ins. Co.* (1849), Id. 337. The cases of *Johnson v. Collins* (1862), 14 Iowa 63; *Thompson v. Bertram* (1863), Id. 476; *Scott's Adm'r v. Gill et al.* (1865), 19 Id. 187; *Johnson v. Knapp* (1873) 36 Id. 616; *Phillips Adm'r v. Van Schaick & Wilcox* (1873), 37 Id. 229; *Roberts v. Austin Corbin & Co.* (1868), 26 Id., 315, support this view. The Iowa Code of Civil procedure provides: "SECTION 2543. Every action must be prosecuted in the name of the real party in interest, except as provided in the next section," which relates to actions by trustees, etc.

The case of *National Bank v. Grand Lodge* (1878), 98 U. S. 123, was an action brought to compel payment of certain coupons formerly attached to bonds issued by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge adopted a resolution as follows: "*Resolved*, that this Grand Lodge assume the payment of the two hundred thousand dollars bonds, issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said association to the amount of said assumption of payment by this Grand Lodge, as the said bonds are paid." The opinion of the Court was delivered by Justice STRONG, as follows: "The resolution of the Grand Lodge was not a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes*. * * The holders

of the bonds were not parties to it, and there was no privity between them and the Lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. * * No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where under a contract between two persons, assets have come to the promisor's hands, or under his control, which in equity belong to a third person. In such a case, it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another, to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt, being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the prom-

isor for his own indemnity ; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue."

Cragin v. Lovell (1883), 109 U. S. 194, followed the doctrine laid down in *National Bank v. Grand Lodge*, *supra*. In this case an action was brought against Cragin, alleging a sale of a plantation by the plaintiff to one Fisk, a portion of the price being paid in cash, and nine notes for the balance payable in successive years, secured by a mortgage of the estate. Plaintiff further alleged that Cragin had paid the first three notes, and that foreclosure proceedings had been taken for a balance due plaintiff on the notes. That subsequently to the purchase by Fisk, Cragin claimed that Fisk was acting merely as agent ; that the purchase in his own name was illegal ; that the money paid down at the time of sale, and subsequently was Cragin's ; and that he had been adjudged, by final decree, to be the legal owner of the estate.

The plaintiff, in support of his right of action against Cragin, relied upon the Louisiana Civil Code of 1870 : "ART. 1890. A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation ; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked." And also upon the Code of Practice of that State : "ART. 35. An equitable action is that which does not immediately arise from a contract, but from equity in favor of a third person, not a party to it, and

for whose benefit certain stipulations have been made ; thus, if one stipulated in a contract entered into with another person, and as an express condition of that contract, that this person should pay a certain sum on his account, or give a certain thing to a third person, not a party to the act, that third person has an equitable action against the one who has contracted the obligation, to enforce the execution of the stipulation." Justice GRAY however held that the provisions of the Codes did not apply to the case, saying : "The only allegations touching the relation of Cragin to these notes are, that in a suit by him against Fisk, he alleged that Fisk, in purchasing the land, acted merely as his agent, and that he owned the land and was liable and ready to pay for it. * * If this amounted to a promise to any one, it was not a promise to the plaintiff, nor even a promise to Fisk to pay to the plaintiff the amount of the notes, but it was, at the utmost, a promise to Fisk to pay that amount to him, or to indemnify him in case he should have to pay it."

In *Pope v. Porter*, (1887, U. S. Cir. Ct., S. D. Iowa, C. D.), 33 Fed. Repr. 7, the plaintiff was a mortgagee of personal property, sold by the mortgagor to the defendant, who agreed to pay the mortgage debt as part of the purchase money. Here SHIRAS, J., states : "It has long been the settled law in Iowa that an action at law can be maintained upon a promise made by A to B to pay a debt due from B to C, provided a sufficient consideration is shown to exist." The cases of *Bank v. Grand Lodge* (1878), 98 U. S. 123, and *Cragin v. Lovell* (1883), 109 U. S. 194, *supra*, were relied

upon by counsel for the defendant as supporting the doctrine that, under the facts in the present case, there was no privity of action between the parties. The learned Judge, however, dismissed this contention by showing, that in *Cragin v. Lovell*, the facts failed to show an agreement between Cragin and Fisk that the former should pay to the mortgagee the debt due her. He also drew attention to the fact that in the cases cited, "the promise made by defendant was concurrent with and dependent upon the contract of the other party, and, being an executory contract between the intermediate parties thereto, a third party could not sue thereon, without, in effect, changing the meaning of the contract." He cites the opinion of Justice STRONG, in *National Bank v. Grand Lodge, supra*, as stating the doctrine applicable to the present case and shows that in the case then before the Court the property "belonged in equity to the plaintiffs; that is to say, they were entitled, by virtue of their mortgage, to take possession thereof, to sell the same, and apply the proceeds to the payment of the debt due them. The defendant came into possession of these assets solely through the contract he made with Cheney [the mortgagor], whereby he assumed and promised to pay the debt due plaintiff as part of the purchase price of the corn, and as, by means of this possession thus obtained, he has been enabled to sell the corn, and now holds the proceeds, he is liable to suit on part of plaintiffs."

This view is taken in the case of *Wood v. Moriarty* (1887), 15 R. I. 518, which was an action of *assumpsit* brought by plaintiff against the defendant to recover the price

of lumber furnished to one Tibbetts for use in the building of defendant's houses. There was a written instrument executed by Tibbetts, transferring and assigning the contract to defendant in consideration of a release from further obligation under it. At the trial, parol evidence was admitted to prove the purchase of the lumber, the execution of the release, and that defendant, besides paying the considerations mentioned, further agreed to pay all bills incurred by Tibbetts on account of the contract. It was contended on the part of the defendant, that the agreement was within the Statute of Frauds, being an agreement, not in writing, to answer for the debt of another. This argument was however met by Chief Justice DUFFER in these words, "An agreement to answer for the debt of another, to come within the Statute of Frauds, must be an agreement with the creditor. A promise by A to B to pay a debt due from B to C is not within the Statute of Frauds * * The contract is absolute * * The course of decision in this State favors the creditor's right to sue, and in principle, we think, recognizes it, though it has not hitherto extended to a purely oral contract." He cites and relies upon *Urquhart v. Brayton* (1878), 12 R. I. 169; and *Merriman v. Social Manufacturing Co.* (1878), Id. 175, in support of his theory, and remarks,—“Courts that allow the action generally hold that it is not affected by the Statute of Frauds, though, * * they do not unite in the reasons which they give for so holding.”

A somewhat different view of this phase of the question has been taken in some of the Courts in this country, holding the contract with-

in the provisions of the Statute of Frauds and therefore void unless in writing. Thus in Connecticut, the Court has decided that a promise made by A to B to pay B's debt to C is within the Statute of Frauds and void unless in writing. This view was taken in *Clapp v. Lawton* (1862), 31 Conn. 95, an action of assumpsit, alleging a promise of the defendants to pay a debt due to the plaintiffs from the firm of F. & W., with a general count for money had and received. F. & W. were publishers of a newspaper, and sold out to defendants, Lawton & Wright, and transferred to them their assets, including the debts due to the firm. As part of the consideration, it was claimed that defendants agreed to pay the debts of F. & W., the plaintiff being the principal creditor. The Court, however, held the agreement to be void, so far at least as the plaintiffs were concerned, by the Statute of Frauds," Justice DUTTON remarking, "It would seem that the mere statement of the case would be enough to show that it is within both the letter and spirit of the Statute. The Statute in terms requires written evidence of any agreement whereby to charge, the defendant upon any special promise to answer for the debt, default or miscarriage of another." Further he contended that "the promise offered in evidence was not to the plaintiffs, nor intended for their benefit. It was a mere arrangement for their own purposes, between defendants and F. & W. The consideration did not move from the plaintiffs." These remarks are approved of by Justice BUTLER in *Packer v. Benton* (1868), 35 Conn. 343.

The earlier cases in Tennessee are to the same effect; *Campbell v. Findley* (1842), 3 Humph. (Tenn.),

330; *McAlister v. Marberry* (1844), 4 Id. 426, but the case of *Moore v. Stovall* (1879), 2 Lea (Tenn), 543, overrules them and establishes that such a contract is not within the Statute, and that the party for whose benefit it is made may sue thereon. There, one Johnson bought land of the plaintiff and gave as part payment his note, a lien being retained on the face of the deed for the purchase money, Johnson sold to defendant, the consideration being the assumption by defendant of the debt to plaintiffs. Upon a rehearing, Justice FREEMAN delivered the opinion of the Court: "The question turns, so far as the principle involved is concerned, on whether this contract is within the Statute of Frauds, and therefore required not only to be in writing, but signed by the party to be charged, and also made direct to the party suing on it. * * Holding the decisions referred to [*Campbell v. Findley*, *supra* and *Erwin v. Wagner* (1813), Cook (Tenn.) 400] not to be in accord with sound principle, the only question is, whether they should be overruled or remain simply because they been made. We think they should be overruled and the rule of law established on a sound basis. Several considerations lead us to this conclusion. The question is not one on which rights of property depend, nor will titles be in the least affected by it. It will in our judgment give us a rule on the subject, not only in accord with sound principle, but be in accord with other principles of our law, well settled, on which we habitually act. For instance, it is beyond question that in a court of equity the law has been long settled that where a vendor has sold the estate without notice, if the purchase money has

not been paid, the original vendor may proceed against the estate for his lien, or against the purchase money in the hands of the purchaser for satisfaction.' 2 Story Eq. J., §1232. That is the precise case, with the additional fact that here the purchaser has expressly contracted the money shall be paid by him to the original vendor, which makes a much stronger case. The principle in such cases is, that the party has money in his hands which he cannot conscientiously withhold from the other party. This is the law in a court of equity, but why not in a court of law when the action of *assumpsit*, an equitable action in such cases, entitles the party to recover that which he equitably ought to have. * * * * Lastly, it attains the justice of the case, and can do no harm to any one to enforce the solemn contract of a party, based on a valuable consideration, received and enjoyed by him."

The same doctrine is upheld in California, where the Civil Code gives the third party a right of action upon a contract made expressly for his benefit. See Section 1559 of the Civil Code cited with *McLaren v. Hutchinson*, *infra*.

The rule in favor of such actions, however, does not apply to the case of a party incidentally benefited by the contract. Thus, in *Chung Kee v. Davidson et al.* (1887), 73 Cal. 522, where the defendant Cook executed a deed which, upon its face, purported to be an absolute conveyance of certain property, but was in fact a mortgage to secure certain indebtedness of Cook to the defendants. By a defeasance subsequently executed, it was agreed that Cook should retain possession of, and manage the property, which consisted of mines and turn over to

the defendants the entire result of each "clean out" of the "flumes and under-currents of the mines," be applied "to the defraying of the expenses of running and working said mines," and "the payment of all promissory notes, obligations, and accounts of indebtedness of whatsoever nature," due said defendants. While working the mine Cook became indebted to certain Chinamen for labor done and laborers furnished, and gave to the Chinamen a written statement of their indebtedness. These claims were properly transferred to the plaintiff, who brought action for the amount due, alleging that under the terms of the agreement or written contract they were entitled to receive the amount from the defendants and Cook, out of certain "gold-dust," the result of a clear-up. Defendants had paid several amounts, upon Cook's order, had taken a sum on account of money due by Cook, and had also paid another party's account, for work done for Cook. The Court held that the contract was not made expressly for the benefit of the plaintiff's assignors. On the contrary, that it was made expressly for the benefit of the parties named therein; and that the most that could be said was that it was a contract incidentally for the benefit of those who worked in the mine. "It is not necessary, that the parties for whose benefit the contract has been made should be named in the contract. It must appear, however, by the direct terms of the contract, that it was made for the benefit of such parties. It cannot be implied from the fact that the contract would, if carried out between the parties to it, operate incidentally to their benefit."

The action was brought under the Civil Code of the State which provides: SEC. 1559. "A contract made expressly for the benefit of a third person, may be enforced by him at anytime before the parties thereto rescind it."

The distinctions taken by the various courts are not all readily reconcilable, yet those stated by Justice SERGEANT in *Blymire v. Boistlle* (1837), 6 Watts (Pa.) 182, would seem to be the law in Pennsylvania, and to have been generally followed: "If one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested. But where the contract is for the benefit of the contracting party, and the third person is a stranger to the contract and consideration, the action must be by the promisee." Quoting the language of Justice HUTTON in *Hadfield v. Lewis* (1656), Het. 176, he proceeds: "there is a difference where the promise is to perform to one who is not interested in the cause, and when he hath an interest. In the first case, he to whom the promise is made, shall have the action, and not he to whom the promise is to be performed."

As pointed out by Justice WOODWARD, in *Guthrie v. Kerr* (1878), 85 Pa. 303: "In the one instance the promisor becomes the custodian and trustee of a fund actually belonging to the beneficiary. In the other, he undertakes to pay some money or do some act in consideration of a benefit conferred on himself." In *Torrens v. Campbell* (1874) 74 Pa. 470, Justice MERCUR stated the first branch of the rule to be that where the promisor re-

ceives money or personal property to be converted into money, in trust for a third party, the action may be sustained in the name of the latter."

The true reason given for this distinction may be gathered from the opinion of Justice SERGEANT in *Blymire v. Boistlle supra*, wherein he says, "Where one person contracts with another to pay money to a third, or to deliver over some valuable thing and such third person is thus the only party in interest, he ought to possess the right to release the demand or recover it by action. But when a debt already exists from one person to another, promise by a third person to pay such debt, being for the benefit of the original debtor, and to relieve him from the payment of it, he ought to have a right of action against the promisor for his own indemnity, and if the promisor were also liable to the original creditor, he would be subject to two separate actions at the same time, for the same debt, which would be inconvenient, and might lead to injustice." The case of *Morrison v. Beckey* (1837), 6 Watts (Pa.) 349, supports these views.

In such cases the consideration, to use the words of Justice ROGERS in *Hind v. Holdship* (1833), 2 Watts (Pa.) 104, "is sufficient, if it arise from any act of the plaintiff, from which the defendant or a stranger derives any benefit, however small, if such act is performed by the plaintiff, with the assent, express or implied, of the defendant; or by reason of any damage, or any suspension or forbearance of the plaintiff's right at law or in equity; or any possibility of loss occasioned to the plaintiff by the promise of

another, although no actual benefit accrues to the party undertaking."

Hostetter v. Hollinger (1888), 117 Pa. 606, was a case in which John S., and Jacob Hostetter each placed a certain sum in the hand of their brother Henry, upon his agreement to contribute a like sum to the fund, the whole to be for the use of Maria Baer since deceased. Maria Baer was not a party to the consideration, and was in some sense a stranger to the contract. "Although she may not even have known of the transaction between the three brothers, yet, if the contract was wholly for her own benefit; if the control of the fund was wholly relinquished by the parties creating it; and Henry Hostetter acted, or assumed to act, as her agent in receiving and holding it, so that the ownership of the fund vested in her, she might maintain an action in her own name when she became informed of the facts. It is well settled in a series of decisions, that he for whose benefit a promise is made, may maintain an action upon it, although no consideration pass from him to the defendant, nor any promise from the defendant, directly to the plaintiff." CLARK, J., citing *Hind v. Holdship* (1833), 2 Watts. (Pa.) 104; *Justice v. Tallman* (1878), 86 Pa. 147 where the defendant had promised Wilson for a valuable consideration to pay his debt to the plaintiff, out of property placed in his hands by Wilson, and *Townsend v. Long* (1875), 77 Id. 143.

The distinctions, which arise where the contract is for the benefit of the contracting party, and the third party is a stranger to the consideration, are perhaps more fully illustrated by the case of *Kountz v. Holthouse* (1878), 85 Pa. 235, where

Campbell and Young, being associated as partners, became indebted to Holthouse, and Young, by a written agreement, sold his interest to Kountz; the latter assuming and agreeing to pay Young's indebtedness. Campbell and Kountz continued the business. Holthouse brought action against Kountz and the Court ruled that it would not lie, Justice MERCUR, saying:—"There is nothing in the case before us indicating that the property sold to Kountz was to be delivered over to the defendant in error; nor that it was to be converted into money and the proceeds be paid to him; nor is there any fair inference, * * that the avails and proceeds of the property and business should pay and discharge the debt due to the defendant in error. * * To enable the third person to sustain the action, money or property must have been placed in the hands of the defendant for his use, or he must have become a party to the new agreement." To the same effect are the cases of *Torrens v. Campbell* (1874), 74 Pa. 470, and *Blymire v. Boistle*, *supra*. The cases of *Torrens v. Campbell* and *Kountz v. Holthouse* are followed in *Zell's Appeal* (1886), 111 Pa. 537.

The same ruling is followed in *Peacock v. Williams* (1887), 98 N. C. 324, where it appeared that the plaintiff had furnished lumber to a contractor, to be used upon certain property owned by one Luke; that his account had not been paid; that the defendant contracted with Luke for a note of \$800 to pay off and discharge "all liens and incumbrances *whatever*" upon the said property; that plaintiff had a lien on the property, registered and filed, and that Luke had due notice of the plaintiff's claim before set-

tlement with the contractor. The defendant had stipulated after payment of all bills to surrender to Luke "full and free possession" of the property, "free from all liens and encumbrances." In the opinion of the Court, Chief Justice SMITH said, that "the plaintiff's right of action rested entirely upon the undertaking on the part of Williams * * to surrender the house to the owner of the lot, 'free from all liens and incumbrances whatever.' * * The defendant incurred, under this agreement and from his possession of the note, no personal liability which the plaintiff can enforce in this form of action, *ex contractu*. The agreement is in substance one for the indemnity of the owner of the property against its being subjected to the asserted lien, and is *solely between the parties to it, with whom the plaintiff is not in privity*. * * Here there is no promise to pay the plaintiff, and the defendant has no funds with which to make the payment, but only a note secured from the party by which they might be derived."

In *Alabama*, a somewhat different course has been taken by the Courts, for in *Shotwell v. Gilkey* (1858), 31 Ala. 724, Justice WALKER stated the law as follows: "Where one, for a sufficient consideration moving from another indebted to a third person, promises him so indebted to pay his creditor, a failure to comply with the contract gives a right of action, either to the promisee, or to the person for whose benefit the promise was made." See also *Mason v. Hall* (1857), 30 Ala. 599. The Civil Code of this State (Id. 1886, p. 577) provides: "2594. Actions on promissory notes, bonds, or other con-

tracts, express or implied, for the payment of money, must be prosecuted in the name of the party really interested, whether he has the legal title or not, subject to any defense the payor, obligor, or debtor may have had against the payee, obligee, or creditor, previous to notice of assignment or transfer, except that, in actions upon bills of exchange and promissory notes payable at a bank or banking house, or at a designated place, and other commercial instruments, the suit must be instituted in the name of the person having the legal title." The meaning of the words, "the party really interested," was considered in *Yerby v. Sexton* (1872), 48 Ala. 311, and was thus explained by Chief Justice PECK: "Where the dry legal title is in one, and a clear, equitable title is in another, whether by transfer, delivery, or otherwise, to whom alone the money belongs, and who only is entitled to receive it, and authorized to discharge the debtor,—in such cases, there is no trouble; the action must be brought in the name of the equitable owner. He is * * the party really interested. But where the party having the legal title, is also the only party entitled to receive the money and discharge the debtor, although, when collected, he holds the money, not for his own use but for the use of some other person or persons, and to whose use he is to apply it or to whom he is bound to pay it,—in such cases, the action must be in the name of the party having the legal title."

The Code of Civil procedure of *Arizona* provides: "680. Every action shall be prosecuted in the name of the real party in interest, except as otherwise prescribed."

The Revised Statutes of *Arkansas*, ch. 119, Id. 1884, p. 972, provide: "SEC. 4933. Every action must be prosecuted in the name of the real party in interest, except as provided in Sections 4935, 4936, and 4938."

California Courts sustain the right of the original creditor to bring his action, except in cases of merely incidental benefit: page 604, *supra*.

In *Colorado* such actions are supported, Justice WELLS, in *Lehow v. Simonton* (1877), 3 Colo. 346, after quoting numerous decisions *pro* and *con*, saying: "The doctrine of the last [those in favor of the action] quoted, while professedly an anomaly, seems to us the more convenient. It accords the remedy to the party who in most instances is chiefly interested to enforce the promise, and avoids multiplicity of actions. That it should occasion injustice to either party seems to us impossible." This is also the law in South Carolina, *Thomson v. Gordon* (1848), 3 Strobl. (S. C.) 196.

The *Connecticut* courts require the promise to be in writing, in compliance with the provisions of the Statute of Frauds: page 603, *supra*.

In *Dakota* the question is provided for by the Civil Code, which provides: "§ 3499. A contract, made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."

In *Florida*, the courts uphold the right of a third party to sue on a promise made to another for his benefit. *Hunter v. Wilson, Stearly & Co.* (1885), 21 Fla. 250, but there must be a clear intention and purpose upon both the part of the

promisor and promisee to benefit such third person directly and primarily: *Wright v. Terry* (1887), 23 Fla. 160.

The Code of *Georgia*, (Id. 1882) provides: "§ 2747. If there be a valid consideration for the promise, it matters not from whom it is moved; the promisee may sustain his action, though a stranger to the consideration."

In *Idaho*, the Revised Statutes (Id. 1887, p. 380) provide: "SEC. 3221. A contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

In *Illinois*, the distinction between simple contracts and specialties, with reference to this right, is abolished by Section 19, ch. 110 of the Revised Statutes of that State as decided by the case of *Dean v. Walker* (1883), 107 Ill. 540, wherein Justice CRAIG, in delivering the opinion of the Court said:—"It is said a third party cannot bring an action in his own name on a contract under seal between third parties * * * but * * the rule of the common law on that subject has been changed by Section 19, chapter 110 of the Revised Statutes of 1874, page 776, so that now it is immaterial, for the purpose of bringing the suit, whether the contract is under seal or not." The section referred to reads as follows:—"19. Any deed, bond, note, covenant or other instrument under seal (except penal bonds) may be sued and declared upon or set off as heretofore, or in any form of action in which such instrument might have been sued and declared upon or set off if it had not been under seal, and demands upon simple contracts may be set-off against demands upon sealed instru-

ments, judgments or decrees (Rev. Stat. ed. 1889, p. 1013).

In *Hume v. Brower et al.* (1887), 25 Ill. App. 130; PLEASANTS, P. J., said:—"It has long been settled that a third party may sue on a simple contract entered into by others for his benefit, and upon such an agreement to pay all the debts of one party any creditor of such party may maintain an action." He cited *Shober v. Kerting* (1883), 107 Ill. 344; and *Snell v. Ives* (1877), 85 Id. 279 in support of his opinion, and followed *Dean v. Walker* (1883), 107 Ill. 540.

The *Indiana* courts uphold the original creditor's action if there is a sufficient consideration.

In *Carnahan v. Tousey* (1884), 93 Ind. 561, Justice Woods states the law as follows: "In an action upon a contract at law, strictly, privity of contract is essential to the right of action, but the rule in equity is different, and by a long line of decisions * * this court has held that a promise of one person to another for the benefit of a third may be enforced in an action brought by the latter in his own name." To the same effect, *Rodenbarger v. Bramblett* (1881), 78 Id. 213. In *Worley v. Sipe* (1887), 111 Ind. 238, the action was brought by a married woman against the defendant to recover a sum of money which she alleged he had promised to pay her. It appeared that her husband was the owner of land, and sold the same to the defendant, the consideration being a promise on his part to pay a certain sum of money to the plaintiff. Chief Justice ZOLLARS held that there was a sufficient consideration for the promise, namely, the release by the plaintiff of her inchoate interest.

The *Iowa* courts also allow the original creditor to sue but put him to an election, so that a suit against the new promisor releases the original debtor: *supra*, page 600.

In *Kansas*, the rule may be taken as well settled, that third parties not privy to a contract, nor to its consideration, may sue upon it to enforce any stipulation made for their benefit: *Anthony v. Herman* (1875), 14 Kans. 494; *Strong v. Marcy* (1885), 33 Id. 109; *Brenner v. Luth* (1882), 28 Id. 583; *Life Assurance Society v. Welch* (1881), 26 Id. 362. The principles governing these cases are well put by Justice VALENTINE, in *Burton v. Larkin* (1887) 36 Kan. 246, quoting the case of *Simon v. Brown* (1877), 66 N. Y. 355, where the following language is used: "It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited, We think this a correct statement of the law * * Of course the name of the person to be benefited by the contract need not be given, if he is otherwise sufficiently described or designated. Indeed he may be one of a class of persons, if the class is sufficiently described or designated. In any case where the person to be benefited is in any manner sufficiently described or designated, he may sue upon the contract."

These views are supported by the case of *The Plano Manufacturing Co. v. Burrows* (1888), 40 Kans. 361; and the very recent one of *Mumper v. Kelley* decided March 8, 1890 (Sup. Ct. Kans).

The Civil Code of *Kentucky* provides—"§ 18. Every action must be prosecuted in the name of the real party in interest, except as provided in Section 21."

"§ 21. A personal representative, guardian, curator, committee of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a receiver appointed by a court, the assignee of a bankrupt, or a person expressly authorized by statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted."

In *Allen v. Thomas* (1860), 3 Met. (Ky.) 198 the Court upheld the doctrine (that the creditor might sue), as "well settled." The case of *Smith v. Smith* (1869), 3 Bush. (Ky.) 625 also supports the rule: there the court relied upon the above section, and held that section 33, (Revised Code, 1888, § 21) did "not take the right from the real party in interest to bring the suit in his own name."

In *Louisiana*, the cases of *The N. O. St. Joseph's Association v. Magnier* (1861), 16 La. Ann. 338, and *Ferguson's Succession* (1863), 17 Id. 255; and the Civil Code of 1870, Art. 1890, and the Code of practice, Art. 35, *supra*, page 601, support the right of a third party to sue upon the contract.

The *Maine* courts proceed upon the ground of an implied promise and a consequent release of the original debtor: page 599, *supra*.

In *Maryland*, the case of *Coates & Brother v. The Penn. Fire Ins. Co. of Philadelphia* (1882), 58 Md. 172, supports the right of the third party to bring action upon the promise made for his benefit.

In *Massachusetts*, the earlier cases

would seem to lead to the conclusion that the rule of law in that State was that such actions could be maintained, for in *Hall v. Mars-ton* (1822), 17 Mass. 575, Chief Justice PARKER said: "It seems to have been well settled heretofore that if A promises B for a valuable consideration, to pay C, the latter may maintain *assumpsit* for the money. * * The principle of this doctrine is reasonable and consistent with the character of the action of *assumpsit* for money had and received. There are many cases in which that action is supported without any privity between the parties other than what is created by law. Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable ground for retaining it, the law creates the privity and the promise." And Justice BIGGLOW, in *Brewer v. Dyer* (1852), 7 Cush. (Mass.) 337, added that, "it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate, nor upon the reason that the defendant by entering into such an agreement, has impliedly made himself the agent of the plaintiff, * * but upon the broader and more satisfactory basis, that the law operating on the act of the parties, creates the duty, establishes a privity and implies the promise and obligation, on which the action is founded." The opinion of Chief Justice SHAW, in *Carnegie v. Morrison* (1841), 2 Met. (Mass.) 381, also supports this view.

The opinions delivered in the more recent cases in that State would, however, seem to be against the right of a third party to sue upon a contract made for his benefit, for in the case of *Exchange Bank of St. Louis v. Rice* (1871), 107 Mass. 37, Justice GRAY defines the law thus: "The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it." He further adds that: "The unguarded expressions of Chief Justice SHAW in *Carnegie v. Morrison* and of Mr. Justice BIGELOW in *Brewer v. Dyer*, *supra*, to the contrary, * * * were afterwards * * * qualified, the limits of the doctrine defined and a disinclination repeatedly expressed to admit new exceptions to the general rule, in * * *Mellen v. Whipple* (1854), 1 Gray (Mass.) 317; *Millard v. Baldwin* (1855), 3 Id., 484; *Field v. Crawford* (1856), 6 Id. 116; and *Dow v. Clark* (1856), 7 Id. 198. Those judgments have since been treated as settling the law of Massachusetts upon this subject." He further referred to *Colburn v. Phillips* (1859), 13 Gray (Mass.) 64; and *Flint v. Pierce* (1868), 99 Mass. 68. Although Justice GRAY laid down the law as above, yet he did not overrule the exceptions stated by Justice METCALF in *Mellen v. Whipple*, *supra*, that, "Indebitatus assumpsit for money had and received can be maintained, in various in-

stances, where there is no actual privity of contract between the plaintiff and defendant, and where the consideration does not move from the plaintiff. In some actions of this kind, a recovery has been had where the promise was to a third person for the benefit of the plaintiff; such action being an equitable one that can be supported by showing that the defendant has in his hands money, which, in equity and good conscience, belongs to the plaintiff, without showing a direct consideration moving from him, or a privity of contract between him and the defendant. * * * Cases where promises have been made to a father or uncle for the benefit of a child or nephew form a second class in which the person for whose benefit the promise was made has maintained an action for the breach of it. The nearness of the relation between the promisee and he for whose benefit the promise was made has been sometimes assigned as a reason for those decisions." 3. [Cases falling within the decision in *Brewer v. Dyer* (1851), 5 Cush. (Mass.) 337,] "where the defendant had the use and occupation of land of the plaintiff, * * * under a promise, or under a legal liability to pay rent for it."

The case of *Felton v. Dickinson* (1813), 10 Mass. 287, where a promise was made to the father for the benefit of his son when he should attain his majority, supports the second exception. The Court took the view that "although the father contracted for the son, yet he had a view to the son's advantage, and not his own," and therefore held the son entitled to recover in his own name.

The principles set forth in *Ex-*

change Bank of St. Louis v. Rice, *supra*, are followed in *Carr v. National Security Bank* (1871), 107 Mass. 43, wherein the defendants were a banking corporation, and the firm of Lincoln and Company had been accustomed to deposit money therein, and draw their checks upon the same. Lincoln and Company, in consideration of \$600 paid to them by plaintiff, drew their check upon the defendants for the like sum, payable to the plaintiff's order, and the plaintiff duly presented the check and demanded payment which was refused, although the defendants had funds in hand, against which the firm were entitled to draw to a greater amount. Justice GRAY here points out, that here there was no trust or position of principal and agent established. "The relation between the defendants and the drawer, as disclosed in the declaration, was simply the ordinary one of banker and customer, which is a relation of debtor and creditor, not of agent and principal, or trustee and *custui que trust*. * * The money deposited becomes the absolute property of the bankers, impressed with no trust, and which they may dispose of at their pleasure, subject only to their personal obligation to the depositor to pay an equivalent sum upon his demand, or order. The right of the bankers to use the money for their own benefit is the very consideration for their promise to the depositor. They make no agreement with the holders of his checks. * * * and the banker's promise to the drawer to honor his checks does not render them, while still liable to account with him for the amount of any check as part of his general balance, liable to an action of contract by the holder also,

unless they have made a direct promise to the latter, by accepting the check when presented, or otherwise." The question of the right of the payee of a check does not, however, fall within the purposes of this annotation which is confined as far as possible to the question involved in the principal case, namely, the right of a third person to sue upon a contract made for his benefit, and must therefore be reserved for future consideration. The still more recent case of *Morrill v. Lane* (1883), 136 Mass., 93, is to the same effect. There the Court held "that a promise made by A to B that A will pay unspecified amounts of money to various persons not named, but described generally as of a certain class, will not support an action by one of those persons against A," no trust arising from such a promise. See further, as upholding the Massachusetts doctrine, *Rogers v. Union Stone Co.* (1881), 130 Mass. 581; *Prentice v. Brimhall* (1877), 123 Id. 291; and *Gamwell v. Pomery* (1876), 121 Id. 207.

The *Michigan* cases would seem to follow the English rule as it exists at the present time. Thus in *Pipp et al. v. Reynolds et al.* (1870), 20 Mich. 88, it appeared that upon a consideration moving from one Ecklin, the defendants promised to perform a job of painting for the plaintiff, which Ecklin had previously agreed with the plaintiffs to do for them. It was not stated to whom this promise of the defendant was made, but, generally that by means of the premises, promises and undertakings set forth in the declaration, the defendants became liable to pay to the plaintiffs the money thereby sought to be recovered. The Court held that—

"though as between Ecklin and the plaintiffs, the former is stated to have undertaken to perform the work, and as between defendants and Ecklin, the defendants are alleged to have promised to carry out that agreement, and thus making the performance of Ecklin's part of the first agreement one of the objects of the second agreement, yet no contract relation between the parties to this suit in respect to the last agreement, is shown, which could entitle the plaintiffs to recover damages for its violation by defendants."

The case of *Turner v. McCarty* (1871), 22 Mich. 264, was an action of *assumpsit* for work and labor done and performed by plaintiff for the contractor for street paving, the defendant being the assignee of the original contractor with the city, and by the terms of the assignment to him had agreed with the assignor to pay all sums of money due to persons for such labor as had been performed by the plaintiff. Chief Justice CAMPBELL declared the case "directly within the principle of *Pipp v. Reynolds*," *supra*. These cases are further supported by *Halsted v. Francis* (1875), 31 Mich., 112, where plaintiff (Francis) declared that he being the owner of a note executed by one Rice, the defendant Halsted, in consideration of the sale and delivery by Rice to defendant of a horse, harness and buggy, undertook and promised Rice to pay the note to plaintiff (Francis) and take up the same at maturity. The Court held "The only contract alleged and proved was a contract between the defendant and Rice, to pay the note of the latter to the plaintiff, who was no party to that contract, who gave no consideration for, and was in no way bound by

it. The only consideration paid was paid by Rice, and he was the only party to be injured by the breach of the contract. The plaintiff still retains the note and Rice's liability upon it." These decisions follow *Brown v. Hazen* (1863), 11 Mich. 219, and are distinguished from *Osborn v. Osborn* (1877), 36 Mich. 47, in which the plaintiff was a creditor of the firm of Osborn, F. & Co., composed of the defendants O., D. & F. and held their note for the debt. F sold out to T who agreed to assume F's share of the partnership liabilities. The new partnership paid interest on the plaintiff's claim until dissolution, when the plaintiff sued the new firm upon the common counts, and also specially on the assumption by the new firm of the old firm's debt to her, and the promise to pay it. The circuit judge thought the action came within those cases already noticed, but Chief Justice COOLEY, drew a distinction, saying:—"In each of those cases, the plaintiff counted on a promise made to a third person, not to himself. In this case, the plaintiff counts upon a promise made to herself. * * There is certainly evidence that the plaintiff accepted the new firm as her debtor in place of the old, and that she did not expect to hold F. liable further.

In *Minnesota*, a stranger to a contract and to its consideration, may maintain an action to enforce stipulations in it made for his benefit. Thus, in *Jordan v. White* (1882), 20 Minn. 91, Justice BERRY follows the ruling in *Sanders v. Clason* (1868), 13 Minn. 379. In that case, N. B. & C. L. Clason, being indebted to Sanders & Co., sold and delivered to M. B. Clason their stock in trade upon the consideration,

in part, of his (M. B. Clason's) promise to pay their indebtedness to Sanders & Co.; Justice McMILLAN, after remarking the great differences in the opinions both in England and in the United States, and citing *Farley v. Cleveland*, *Lawrence v. Fox*, *infra*, and the words of Mr. Parsons in his work on Contracts (*ante*) says,—“Under these circumstances, in view of the authorities, we are of opinion that the plaintiffs can maintain this action, and that the complainant as to this promise states facts sufficient to constitute a cause of action.”

In *Mississippi*, the courts uphold the right of a third party to sue, especially when the contract is “adopted by him, or where he has * * a beneficial concern and interest in the transaction:” *Sweatman v. Parker* (1873), 49 Miss. 19; *Bonner v. Marx* (1875), 51 Id. 141.

The same is the law in *Missouri*. In *Rogers v. Gosnell* (1875), 58 Mo. 589, Justice WAGNER says,—“It is now the prevailing doctrine, that an action lies on the promise made by a defendant upon a valid consideration to a third person for the benefit of a plaintiff, although the plaintiff was not privy to the consideration.” He cites *Meyer v. Lowell* (1869), 44 Mo. 328; *Rogers and Peak v. Gosnell* (1873), 51 Id. 466; and *Lawrence v. Fox*, *infra*, in support of his opinion. See also *Schuster v. Kas. City, St. Jo. & Council Bluffs RR. Co.* (1875), 60 Id. 290; *Mosman v. Bender* (1883), 80 Id. 579. From the case of *Rogers et al. v. Gosnell* (1873), 51 Mo. 466, it would seem that either party might maintain the action, for “the courts have repeatedly held, that a person for whose benefit a contract is made, may sue in his own name, when it appears on the face of the

contract that he is the beneficiary. This was the law before our code of practice was adopted, and that Code allowing a trustee to sue, has not altered this rule.” The provision of the Code referred to provide: “SEC. 1990. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract.” And SEC. 1991. “An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.”

The Code of Civil Procedure of *Montana* (Comp. Stats. Id. 1887, pp. 60, 61) provides: “SEC. 4. Every action shall be prosecuted in the name of the real party in interest; except as otherwise provided in this act.” And “SEC. 6. An executor or administrator, or trustee of an express trust or a person expressly authorized by statute, may sue without joining with him the person or persons for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.”

In *Nebraska*, the courts have followed the rule as laid down in the principal case and the cases cited therein; *Shamp v. Meyer* (1886), 20

Neb. 223, Chief Justice MAXWELL, saying that, "where one makes a promise to another for the benefit of a third person, such third person may maintain an action upon the promise though the consideration does not move from him. This, we think, is a correct statement of the law, and it is decisive of this case." The Code of Civil procedure of that State provides: "SEC. 29. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in Section Thirty-two. The section referred to relates to actions by trustees and others standing in a fiduciary position.

In *Nevada*, such actions are allowed even, it would seem, independently of the Statute in that State, for in *Miliani v. Tognini* (1885), 19 Nev. 133, Justice LEONARD observes:—"Besides the statute which provides that every action shall be prosecuted in the name of the real party in interest, this Court has held, in three different cases, that the beneficiary named in such a contract may maintain an action thereon in his own name." The cases referred to are *Ruhling v. Hackett* (1865), 1 Nev. 360; *Alcalda v. Morales* (1867), 3 Id. 132; and *Bishop v. Stewart* (1878), 13 Id. 25. The Statute referred to in the above case (Gen. Stat. ed. 1885, p. 755) provides:—"3026. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this Act."

The courts of *New Hampshire* require the original creditor to be a party to the arrangement, or to subsequently adopt and assent to it; substantially, they insist upon a novation, a topic not within the scope of this article. (See page 598, *supra*.)

The Courts of *New Jersey* hold that one who is not a party to a contract cannot sue in respect of a breach of duty arising out of the contract. They admit there is a class of cases in which a person performing service or doing work under a contract may be held in damages for injuries to third persons, occasioned by negligence or misconduct connected with the execution of the contract, these being cases where the duty or liability arises independent of the contract: *Marvin Safe Co. v. Ward* (1884), 17 Vr. (46 N. J. Law), 19. The case of *Crowell v. Currier* (1876), 12 C. E. Green (27 N. J. Eq.) 152, would, however, seem to establish the rule, in favor of such actions on simple contracts, "as settled, in this State, for the present. But it has never been understood to apply to contracts under seal:" Vice Chancellor who also referred to *Joslin v. N. J. Car Spring Co.* (1873), 7 Vr. (36 N. J. Law) 141, wherein the Court held such actions maintainable.

The Code of Civil procedure in *New Mexico* provides: "§1882. Every action must be prosecuted in the name of the real party in interest, except as provided in the next section."

The theory deducible from the *New York* decisions would seem to be this: that in order to give an action to a third party, who may derive a benefit from the performance of the promise, there must be, *first*, an intent by the promisee to secure some benefit to the third party, and, *second*, some privity between the promisee and the party to be benefited, and some obligation or duty arising from the former to the latter which would give him a legal or equitable claim to the bene-

fit of the promise, or an equivalent from him personally. A legal obligation or duty of the promisee to the beneficiary will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise; the obligation of the promisee furnishes an evidence of the intent of promisee to benefit the third party, and creates a privity by substitution with the promisor. A mere stranger cannot intervene; there must be a new consideration or some prior right or claim against one of the contracting parties.

In *Farley v. Cleveland* (1825), 4 Cowen (N. Y.) 432; affirmed (1827), 9 Id. 639, Farley sued Cleveland, declaring specially, that one Moon had given the plaintiff a promissory note; that Cleveland, in consideration of fifteen tons of hay sold and delivered by Moon to him, at his instance, had promised to pay the note of Moon to Farley. The Court held that "in all these cases founded on a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise either from the plaintiff or the original debtor, the subsisting liability of the original debtor is no objection to the recovery."

The principle declared in this case was followed in *Lawrence v. Fox* (1859), 20 N. Y. 268, where one Holly loaned to the defendant \$300, stating at the time that he owed that sum to the plaintiff and had agreed to pay it to him the then next day; the defendant, at the time of receiving the money, promised to pay it to the plaintiff. A nonsuit was moved for on three grounds, viz: That there was no proof tend-

ed to the plaintiff, that the agreement by the defendant with Holly to pay plaintiff was void for want of consideration, and that there was no privity between the plaintiff and defendant. Justice H. GRAY refused the nonsuit, and said that *Farley v. Cleveland*, *supra*, "had never been doubted as sound authority for the principle upheld by it," and "put to rest the objection that the defendant's promise was void for want of consideration."

The argument from want of privity was met by Justice GRAY in the following language:—"I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. * * The duty of the Trustee to pay the *cestui que trust*, according to the terms of the trust, implies his promise to the latter to do so. In this case, the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of duty imposed in the one case may be visited, and justly, with more serious consequences than in the other by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) 'that [when] a promise [is] made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach, has been applied, to trust cases, not because it was ex-

clusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases."

While this was the opinion of Justice GRAY, Chief Justice JOHNSON, and his associates, DENIO, SELDEN, ALLEN and STRONG, were of opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

Justice COMSTOCK delivered a dissenting opinion, wherein he strongly upholds the principles of *Tweedle v. Atkinson*, *supra*, as follows: "The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking." He contended that *Mellen v. Whipple*, *supra*, was a trust case, wherein the defendant had money in his hands belonging to a trust fund, which was the foundation of the duty or promise in which the suit is brought, and that such cases were not authorities for the doctrine in question and did not sustain it.

In *Vrooman v. Turner* (1877), 69 N. Y. 280, the action was to foreclose a mortgage on premises which came through several *mesne* conveyances to one Sanborn. In none of these did the grantee assume to pay the mortgage, but when Sanborn conveyed to Turner the deed contained a clause stating that the

conveyance was subject to the mortgage, "which mortgage the party hereto of the second part hereby covenants and agrees to pay off and discharge, the same forming part of the consideration thereof." The case was distinguished from *Lawrence v. Fox*, *supra*, the Court saying: "The rule which exempts the grantee of mortgaged premises, subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability to the holder of the mortgage when the grantee is not bound in law or in equity for the payment of the mortgage, is founded in reason and principle, and is not inconsistent with that class of cases in which it has been held that a promise to one for the benefit of a third party may avail to give an action directly to the latter against the promisor. * * To give a third party who may derive a benefit from the performance of the promise, an action, there must be, *first*, an intent by the promisee to secure some benefit to the third party, and *second*, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. * * A legal obligation or duty of the promisee to him, will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishes an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor. A mere stranger cannot intervene,

and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement."

The more recent case of *Todd v. Weber* (1884), 95 N. Y. 181, takes the doctrine as well settled that the right of a third party to maintain *assumpsit* on a promise, not under seal, made to another for his benefit, as now the prevailing rule in this country.

A case has very recently been brought before the Court of Appeals of New York in which the sufficiency of consideration was again raised. From the facts it would appear that the defendant was the executor of one Wright, and that the testator's brother, who was his heir at law and next of kin, contested the probate. A compromise was made between the executor (the defendant in the present action) and the brother of the testator, that the objection should be withdrawn in consideration of the defendant's paying the plaintiff in the present action, a certain sum. The agreement was reduced into writing and read as follows: "For value received, I hereby promise to pay to Saint Mark's Church, New Castle, Westchester County, the sum of five hundred dollars. It is understood that said Church will appropriate the interest of said money to the improvement, adornment, and care-taking of the churchyard of said church: but the payment thereof shall not be exacted till the decease of Thomas Wright [the brother]. It is further understood that upon the execution and

delivery, by the residuary legatees named in the will of Lewis Wright [the testator], of a written agreement or of a sufficient promise to bind them, instead of the undersigned, to the above, then this writing shall be destroyed, or delivered to the undersigned, Chas. G. Teed." After giving the definition of consideration as in *Currie v. Misa* (1875), L. R., 10 Ex. 162, as follows: "A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other," the Court proceeds: "It is not essential that the person to whom the consideration moves should be benefited, provided the person from whom it moves is, in a legal sense, injured. The injury may consist of a compromise of a disputed claim, or forbearance to exercise a legal right; the alteration in position being regarded as a detriment that forms a consideration, independent of the actual value of the right forborne. * * As recently held by this Court, [*Todd v. Weber, supra*,] after a careful review of the authorities, a party for whose benefit a promise is made, may sue in *assumpsit* thereon even if the consideration thereof arose between the promisor and a third person." *Rector etc. of St. Mark's Church v. Teed*, Ct. of App., N. Y., June 24, 1890.

In *North Carolina*, the courts uphold the doctrine, it would seem, only, upon the ground of money had and received to the plaintiff's use: *Draughan v. Bunting* (1848), 9 Ired. (N. C.) 10; *Hall v. Robinson* (1847), 8 Id. 56; and the more recent case of *Peacock v. Williams, supra*, pages 606-7, while noticing

the want of privity, confirms the above.

The Ohio courts recognize this right of action in the original creditor. In *Trimble v. Strother* (1874), 25 Ohio St. 378, Justice WHITE, said "We do not question the former rulings of this Court, that a party may maintain an action on a promise made for his benefit, although the consideration moved from another, to whom the promise was made. But this rule must be understood and applied with its proper qualifications." He cited *Bagaley v. Waters* (1857), 7 Ohio St. 359; *Miller & Co. v. Florer* (1864), 15 Ohio St. 151; *Brewer v. Dyer and Millen v. Whipple*, *supra*, and *Thompson v. Thompson* (1854), 4 Ohio St. 333, wherein Chief Justice THURMAN says:—"It is well settled that if one person makes a promise to another for the benefit of a third person, that third person may maintain an action at law on that promise."

The Oregon Code of Civil Procedure provides: "§ 27. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in Section 29, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." And § 29: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section." Hence, a person for whose benefit a promise is made being the party beneficially interest-

ed, the real party in interest, may bring suit thereon in his own name: *Holladay v. Davis* (1873), 5 Or. 43; *Baker & Smith v. Eglin* (1883), 11 Id. 333; even though the contract be under seal: *Hughes v. Oregon Railway and Nav. Co.* (1884), 11 Id. 437; *Schneider v. White* (1885), 12 Id. 503.

The Pennsylvania cases show the rule in that State to be, that where A promises B to pay B's debt to C out of funds placed in his hands by B, the case does not fall within the statute of Frauds, and therefore "the promise is not simply to pay the debt of another, but to hand over funds appropriated by the debtor himself to the creditor for whose use he deposits them. In such case, the creditor, though not present, is the party to be benefited, and becomes the owner of the fund thus impressed with a trust for him and can sue for it:" *Justice v. Tallman* (1878), 86 Pa. 147. Chief Justice MERCUR, in *Townsend v. Long* (1875), 77 Pa. 143, thus states the law upon this point: "Where there is a transfer of a fund to the promisor, for the payment of the debt * * he is liable to the creditor on his verbal promise made to the owner of the fund; or if property charged with the payment of the debt be transferred to him, on his promise to the vendor to pay the debt, he is liable to an action by the creditor." In other cases it would seem, that in order to entitle the third party to sue upon the contract, he must have become a party to, or adopted, the new agreement: *supra*, pages 605-6.

The Rhode Island courts hold that the contract is not within the statute of Frauds, and generally uphold the third party's right to sue: *supra*, page 602.

The Code of Civil Procedure of *South Carolina* provides: "SECTION 132. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in SECTION 134; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of the grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision." And the case of *Brown v. O'Brien* (1845), 1 Rich. (S. C.) 268, supports the third party's right to sue. *Thompson v. Gordon* (1848), 3 Strobb. (S. C.) 196.

The *Tennessee* courts support the right upon the equitable doctrine that allows an original vendor to proceed either against the estate, or against the purchase money in the hands of the sub-purchaser. It looks upon the action of *assumpsit* in such cases as being an equitable one, entitling the party to recover that which he equitably ought to have: *supra*, pages 603-4.

The *Texas* courts uphold the doctrine that if a party received money from A to pay to B, the latter may maintain a suit against him for it. And if one, for sufficient consideration, undertake to pay a debt due to another by a third party, such undertaking is not within the statute of Frauds: *Monroe v. Buchanan* (1863), 27 Tex. 247. The real party in interest must sue: *Thompson v. Cartwright* (1846), 1 Tex. 87.

The compiled laws of *Utah* (ed. 1876, p. 492) provide: "SECTION 4. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act."

The *Vermont* courts hold that if A receives property from B to convert into money, under a promise to pay the debt due from B to C, and converts such property into money, C may sue in his own name for his debt; but where the contract is special, or to the extent that it is special, it can only be sued in the name of the party with whom it is made, and from whom the consideration moves: that after the money is realized it becomes absolutely the money of the plaintiff in the defendant's hands, and the law implies a promise directly from A to C: *Phelps, Dodge & Co. v. Conant & Co.* (1858), 30 Vt. 277; *Crampton v. Ballard* (1838), 10 Id. 251.

The Code of Civil Procedure of *Washington* provides: "SECTION 4. Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law."

In *West Virginia*, Chap. 71 of the code provides: "2. An immediate estate or interest in, or the benefit of a condition respecting any estate, may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made, for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or

promise." *Johnson v. McClung* (1885), 26 W. Va. 659, shows the effect of this section to be not to divest rights, but to afford remedies to parties not allowed by technical rules of pleading at common law, and interprets the section as reading thus: "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or (if a covenant or promise is made for the sole benefit of a person) with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise."

The Revised Statutes of *Wisconsin* (ed. 1889, p. 1482) provide: "SECTION 2605. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section two thousand six hundred and seven; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of the contract."

The Revised Statutes of *Wyoming* (ed. 1887, page 558) provide: "SECTION 2382. An action must be prosecuted in the name of the real party in interest, except as provided in the next two following sections; but when a party asks that he may recover by virtue of an assignment, the right of set-off, counter-claim and defense, as allowed by law, shall not be impaired." The sections referred apply to actions on bonds and by executors, officers, trustees and so forth.

In conclusion, the right of a third party to sue upon a contract made with another for his benefit, is upheld by the Supreme Court of the United States in cases where assets have come to the promisor's hands, or under his control, which in equity belong to such third party, and that upon the ground of an implied promise, and also in cases where the plaintiff is the beneficiary solely interested in the promise: *supra*, pages 600-1, and *Hendrick v. Lindsay et al.* (1876), 93 U. S. 143.

Philadelphia. ERNEST WATTS.

ABSTRACTS OF RECENT DECISIONS.

BILLS AND NOTES.

Alteration of note under seal, where no rate of interest is expressed and the legal rate is seven per cent, by an *addendum* placed on the lower end of the paper, after its execution and delivery, and not incorporated in the body of the note, reciting that "the above note is to be accounted for with interest at eight per cent, per annum," which *addendum* is signed by the principal, but not by his surety, discharges the latter from all liability; such *addendum* is not a new contract of the principal alone, but constitutes a material alteration of the original note. *Sanders v. Bagwell*, S. Ct. S. C., March 6, 1890.

CONSTITUTIONAL LAW.

Peddling without a license cannot be forbidden by a State statute to citizens of another State; such prohibition is an interference with interstate commerce. *Wrought Iron Range Co. v. Johnson*, S. Ct. Ga., April 4, 1890.

Rolling stock of a foreign railroad company, which is used in interstate commerce, is not subject to taxation by a State in which such company operates a leased road. *Bain v. Richmond & D. R. R. Co.*, S. Ct. N. C., March 17, 1890.

CRIMINAL LAW.

Confession made before the coroner, by a person arrested for murder, after he had been informed as to his right to testify or not, and that his statement might be used against him, is voluntary and admissible in evidence upon his trial, although he subsequently refuses to sign the deposition and denies having made it. *People v. Chapleau*, Ct. App. N. Y., April 29, 1890.

DEEDS.

Conveyance to a man and his wife and "the survivor of them, in his or her own right," gives each grantee an estate for life, with remainder in fee to the survivor. *Mittel v. Karl*, S. Ct. Ill., May 14, 1890.

Undue influence, sufficient to warrant the setting aside of a deed is shown by the following facts: A father, according to a long-fixed and oft expressed intention to make provision for his natural daughter, to whom he was deeply attached, conveyed certain land to her; his legitimate daughter and her husband afterwards importuned him with threats to have the land reconveyed; he thereupon went with the counsel of his son-in-law to the house where his natural daughter was visiting, and, in the absence of any one to represent or advise her, persuaded her against her will to sign a deed which he had taken with him, already prepared, and which reconveyed the land to himself; the father was at the time old and feeble, and died only a few days afterwards. *Davis v. Strange's Exr.*, S. Ct. App. Va., April 10, 1890.

FIRE INSURANCE.

Liability upon a policy for \$3000, covering twenty-one different pieces of property, worth in the aggregate \$90,000, and insuring each of such pieces for one-thirtieth of its value, such policy also stating that the company should be liable only for such "proportion of any loss as the sum insured bears to the whole sum insured," and the total insurance being \$60,000, will be fixed at one-twentieth of the total loss sustained. *Illinois Mut. Ins. Co. v. Hoffman*, S. Ct. Ill., April 22, 1890.

Machinery in a mill does not constitute a "mill or manufactory" within the meaning of a clause in a policy rendering it void "if a building covered by this policy shall become vacant or unoccupied, or, if a mill or manufactory, shall stand idle," without notice to and the consent of the company, and the standing idle of the machinery does not create a forfeiture. *Halpin v. Ins. Co. of North America*, Ct. App. N. Y., 2d Div., March 21, 1890.

Morocco factory, which is vacated by the tenants, and its key given to the owner's renting agent, who visits it occasionally, is unoccupied within the meaning of a clause in a policy making it void, if the building become vacant or unoccupied. *Halpin v. Aetna Fire Ins. Co.*, Ct. App. N. Y., 2d Div., March 21, 1890.

INFANTS.

Negligence may be attributed to a child seven years of age; the true rule is that a child is to be held to the exercise of care for its personal safety according to its age, experience and intelligence, and the circumstances by which it is surrounded. *Chicago City Ry. Co. v. Wilcox*, S. Ct. Ill., May 14, 1890.

Negligence of parents, in permitting a child to stray beyond their immediate control into a place of danger, cannot be imputed to the child. *Id.*

LANDLORD AND TENANT.

Reduction of rent, reserved by a written lease, may be orally agreed upon between the parties, and when, at the end of each quarter, the reduced rent has been paid to and receipted for in full by the lessor, the latter cannot revoke the agreement, which may be proved by parol in defense of an action to recover the full amount reserved by the lease. *McKenzie v. Harrison*, Ct. App. N. Y., 2d Div., April 22, 1890.

LIFE INSURANCE.

Phrases, "related to," "relations," and "next of kin," when used in an insurance policy or certificate, as in any other contract or in a statute or will, include only relations by blood, and not connections by marriage. *Supreme Council of Chosen Friends v. Bennett*, Ct. Ch. N. J., May 22, 1890.

MASTER AND SERVANT.

Child of tender years may recover from his master for injuries received from machinery which the master negligently ordered him to oil, and the dangerous nature of which he could not properly appreciate, provided he used due care according to his capacity. *Hinckley v. Horazdowsky*, S. Ct. Ill., May 14, 1890.

Lien upon cattle, under a statute which gives to any person who shall depasture or feed any horses, cattle, hogs, sheep or other live stock, or bestow any labor, care or attention on the same, at the request of the owner or lawful possessor thereof, a lien for his just and reasonable charges, cannot be acquired by one who is employed as a servant to tend and feed the cattle of his master. *Bailey v. Davis*, S. Ct. Or., May 8, 1890.

MECHANIC'S LIENS.

Replacing defective hearths previously put in a house which was otherwise completed, does not extend the time for filing a mechanic's lien. *Harrison v. Women's Homeopathic Hospital*, S. Ct. Pa., May 12, 1890.

MORTGAGES.

Acknowledgment under seal, made by a grantee more than a year after the execution of his deed, that he held the land as security for a note, and that after payment of the note he had no further right to the land, does not prove the deed a mortgage, unless it is shown that such acknowledgment was made under an agreement entered into at the time of the execution of the deed. *Waters v. Crabtree*, S. Ct. N. C., April 21, 1890.

Real estate mortgage, made by the owner to a partnership in its firm name, to secure an indebtedness to it, and duly executed and recorded, as required by statute, constitutes a valid lien upon the property in favor of the firm. *New Vienna Bank v. Johnson*, S. Ct. Ohio, April 29, 1890.

PARTNERSHIP.

Agreement between two persons by which one of them advances the capital and the other performs the services necessary to carry on a business, the capital to be repaid out of the partnership stock, and the balance then remaining, after payment of expenses, to be equally divided as profits, constitutes a partnership, and the relation is not altered by the fact that interest is charged upon the capital furnished. *Southern Fertilizer Co. v. Reames*, S. Ct. N. C., April 14, 1890.

PUBLIC OFFICERS.

Secretary of the Treasury, who has acted upon every matter of discretion in considering whether the United States is indebted to a citizen for work done under a contract, and has arrived at the point where the only act to be performed is the delivery of the draft for his compensation, which act is purely ministerial, may be compelled by *mandamus* to make such delivery. *U. S. ex rel. Redfield v. Windom*, S. Ct. D. C., May 5, 1890.

RAILROADS.

Injunction will not be granted against a railroad company to restrain it from using its tracks in the neighborhood of the complainant's dwelling in making up its outgoing trains and in unmaking its incoming trains, in doing which loud noises are made by means of the cars, engines and men, smoke and steam are cast off, the dwelling of the complainant is caused or vibrate and, when the doors or windows are open, smoke and steam are carried therein, so that the inmates are aroused from sleep and the complainant's wife is afflicted with nervousness, unless it be also shown that there is some abuse or negligent use by the railroad of its franchise. *Beide-man v. Atlantic City RR. Co.*, Ct. Ch. N. J., April 18, 1890.

Warning is not required to be given to passengers on board a railroad train before starting the train from a wood station where it has stopped to take on wood, and a passenger who goes upon the platform of a car, after the train has stopped, contrary to a posted notice warning him not to do so, and, while standing there without holding on to the railing, is thrown off by the starting of the train and injured, cannot recover from the railroad company, although no signal for starting was given. *Malcom v. Richmond & D. R. R. Co.*, S. Ct. N. C., March 31, 1890.

WILLS.

Erasure by a testatrix of the word "fourteenth," without rendering it illegible, and the interlineation of the word "twelfth," the effect of which would be to increase smaller devises to larger ones, is inoperative and does not change nor revoke the provision of the original will. *Gardiner v. Gardiner*, S. Ct. N. H., March 14, 1890.

JAMES C. SELLERS.

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AMERICAN RIGHTS IN THE BEHRING SEA.

The Behring Sea controversy includes two questions—the one of fact, the other of law. First, is the suppression of unauthorized sealing in Behring Sea necessary for the preservation of our seal fishery? Second, if such suppression is necessary, have the United States the right to suppress it at points more than three miles from land?

The facts adduced by Mr. Blaine in his letter of January 22, 1890, to Sir Julian Pauncefote, that the fur seals have been exterminated in every part of the world except Behring Sea, and that the wanton destruction of seals in that Sea by Canadian vessels during the last four years, has reduced the product of the fishery by forty per centum, would seem to be conclusive evidence that the first question must be answered in the affirmative.

Assuming then, that the suppression of sea fishing for seals in Behring Sea, is necessary for the preservation of the seals, let us discuss the legal question whether the United States have the right to stop such fishing. The English claim is, that, at the distance of three marine miles from land, the jurisdiction of the United States over foreign vessels abruptly ends, that beyond that limit a vessel flying the British flag may with impunity commit any act short of actual piracy. The American position is, that ownership of the land on which seals make their home, carries with it the right to protect them from wanton destruction, even beyond the three-mile belt.

I.

Whether the open sea is susceptible of ownership, is a question which has perplexed jurists and drawn nations into war. In 1609, Grotius published his celebrated treatise *De Mare Libero*, in which he endeavored to prove, both by argument and authority, that the sea, being the common heritage of all, could not become the property of any one nation. The opposite view was ably maintained by Selden, in his *Mare Clausum*, published in 1635. Since then the controversy has been carried on by the different writers on international law, the old arguments and the old authorities being gone over again and again, without producing unanimity of opinion.

Nor has the conduct of the different governments been any more harmonious than the writings of the jurists. The right to appropriate part or all of the sea has been affirmed or denied as suited the interest of each particular nation.

Thus England has always claimed supremacy over the seas surrounding her coasts, even when Van Tromp sailed the English Channel with a broom at his masthead, while during the Napoleonic wars, she denied the right of the Baltic powers to maintain the neutrality of the Baltic sea.

Out of this chaos of conflicting arguments and inconsistent claims, there has been evolved the rule that each maritime nation has the right of exclusive jurisdiction over some part of the open sea adjoining its coasts. But how far that jurisdiction extends, has not been exactly determined. The rule is stated by different writers to rest on two different principles that have no necessary connection with each other. One is, that the jurisdiction shall extend only so far as its exercise may be enforced from land, that is to say, the distance of a cannon shot from the shore—conventionally spoken of as three marine miles, though modern ordinance have a range of thrice that distance. This is the principle on which England wishes to limit our jurisdiction in Behring Sea. The other principle is, that the jurisdiction shall extend so far as is necessary for the due protection of the rights of the nation and its citizens.

In most cases the three-mile limit is sufficient for all purposes, and it has therefore been adopted and enforced in numberless instances, and has acquired the sanction of long established usage. But where, as in case of the seal fishery, police powers must be exercised outside the three-mile limit in order to be effective, it becomes necessary to determine which of these two principles should prevail.

As there is no good reason for asserting jurisdiction, unless a necessity for its exercise exists, it seems to follow logically that the extent of the jurisdiction should be measured by the necessity which created it. And when we remember that in ninety-nine cases out of a hundred, this jurisdiction is enforced not by means of cannon on shore but by means of cannon on board of ships, the reason of the three-mile limit seems to have but an unsubstantial foundation. *Cessante ratione legis, cessat ipsa lex.*

The doctrine that sea jurisdiction is coterminous with the necessity, has been distinctly recognized and adopted by Great Britain. Thus in the preamble to an act of Parliament passed in 1878 (41 and 42 Vict. c. 73), it is stated that—

The rightful jurisdiction of Her Majesty, her heirs and successors, extends and always has extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defense and security of such dominions.

It has also the authority of eminent jurists. It is said by Chancellor KENT:—

It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a State may lawfully extend its exclusive dominion over the sea adjoining its territories. All that can be reasonably asserted is that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety and for some lawful end : 1 Kent Com. *29.

The same doctrine is thus laid down by Mr. Chitty :—

It is not easy to determine to what distance a nation may extend its rights over the sea by which it is surrounded. *Bodinus* pretends that, according to the common right of maritime nations, the Prince's dominion extends to the distance of thirty leagues from the coast. But between nation and nation, all that can reasonably be said is, that in general the do-

minion of the State over the neighboring sea extends as far as her safety renders it necessary and her power is able to enforce it: 1 Chitty Com. Law 99.

In Wharton's Digest of International Law, section 32, we find this statement:—

The limitation to three miles of the marine belt is based in part on treaty and in part on customary law. It does not of itself preclude the sovereign of the shore from exercising police jurisdiction over any destructive agencies, which, no matter at what distance from the shore, may inflict direct injury on the shore, or its territorial waters.

In the case of *Church v. Hubbard* (1804), 2 Cranch (6 U. S.) 234, Chief Justice MARSHALL laid down the law as follows:—

To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security, does not seem to be perfectly correct. The seizure of a vessel within the range of its cannon by a foreign force, is an invasion of its territory and is a hostile act, which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. In different seas and on different coasts a wider or more contracted range in which to exercise the vigilance of the government will be assented to.

It is to be remembered that this statement was not made in defense of the seizure of a foreign vessel by our government, but of the seizure of an American vessel on the high seas by a foreign power, so that the language used could not have been dictated by national prejudice.

The doctrine laid down in *Church v. Hubbard* has been acted on by both the United States and England. The British "hovering act," passed in 1736, (9 Geo. II, c. 35) assumed for revenue purposes, a jurisdiction of four leagues from the coast, by prohibiting foreign goods from being transshipped within that distance without payment of duties; and Congress in 1799 enacted that—

The officers of the revenue cutters shall go on board all vessels which arrive in the United States, or within four leagues of the coast thereof, if bound for the United States, and search and examine the same * * * and shall remain on board such vessels until they arrive at the port or place of their destination: Rev. Stat. § 2760.

The former act has been repealed by Parliament, but the right to enforce it has never been disclaimed, and was ex-

pressly asserted by Sir WILLIAM SCOTT, afterward Lord STOWELL, in the case of *Le Louis* (1817) 2 Dods. Ad. 245.

In another way, too, has England asserted jurisdiction beyond the three-mile belt. The pearl fisheries of Ceylon, which extend from sixteen to twenty miles from shore, have been repeatedly leased by the British government and are now conducted by the government itself (*Encyclopaedia Britannica*, vol. 5, p. 364) and its title to these fisheries is maintained by English jurists: *Chitty Com. Law* 98.

So that if the decisions of Lord STOWELL and of Chief Justice MARSHALL and the writings of Chancellor KENT and of Mr. CHITTY, are authority, and if the practice of the English as well as of the American government counts for anything, then the doctrine that a nation may, when necessary for its own protection, exercise jurisdiction beyond the conventional three-mile limit, must be taken to be a firmly established principle of international law, as that law is understood both in the United States and in England.

II.

In an English review of Wharton's *Digest of International Law*, contained in the *Law Magazine and Review* for November, 1889, it is said that it appears from the well sustained identity of language, held by former Presidents and Secretaries of State, that the historical tradition of the United States is in favor of that absolute freedom of the sea outside the three-mile belt which is contended for by the British government in regard to the seal fishery. This statement needs modification. If we examine the utterances of our Secretaries of State from JEFFERSON to BLAINE we will find that while accepting the three-mile limit as the ordinary rule for ordinary purposes, they recognize the fact that the rule has its exceptions, or rather its qualifications. Let us look at the record.

In 1793, Mr. JEFFERSON, then Secretary of State, wrote to the French Minister:—

The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, esti-

mated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us in reason, to as broad a margin of protected navigation as any nation whatever.

Thus, at the outset of our diplomatic history, the principle that the extent of a nation's jurisdiction over the ocean varies according to circumstances, was distinctly recognized.

In 1807, Mr. MADISON, while Secretary of State under JEFFERSON, in instructing the American Ministers at the Court of St. James, wrote as follows:

There could surely be no pretext for allowing less than a marine league from the shore, that being the narrowest allowance found in any authorities on the law of nations. If any nation can fairly claim a greater extent, the United States have pleas which cannot be rejected; and if any nation is more particularly bound by its own example not to control our claim, Great Britain must be so by the extent of her own claims to jurisdiction on the seas which surround her.

In 1863, when the United States resisted the claim of Spain to jurisdiction over the sea within six marine miles of the shore of Cuba, Mr. SEWARD admitted by implication that the jurisdictional limit might be varied by circumstances, for, after asserting the general doctrine of a three-mile belt, he adds:—

The undersigned is far from intimating that these facts furnish conclusive reasons for denying the claim a respectful consideration. On the contrary, he very cheerfully proceeds to consider a farther argument, derived, as Mr. TASSARA supposes, from reason and justice, which he has urged in respect to the claim. This ground is, that the shore of Cuba is, by reasons of its islets and smaller rocks, such as to require that the maritime jurisdiction of Cuba, in order to purposes of effective defense and police, should be extended to the breadth of six miles.

Mr. SEWARD then proceeds to discuss the question of fact, whether the physical conditions of the Cuban coasts are such as to require an extension of the ordinary maritime jurisdiction. The claim of Spain is rejected by him, not because the argument by which it was defended was invalid, but because the assumed facts on which that argument rested did not exist.

In 1886, Mr. BAYARD, in discussing the right of fishing in the Atlantic Ocean, after asserting the steady adherence of the United States to the doctrine of the three-mile limit adds:—

It is true that there are qualifications to this rule.

From these quotations it may be seen, that while the United States have uniformly asserted, in no uncertain tones, their jurisdiction over the water within the three-mile belt adjoining their coasts, they have repeatedly admitted that the rule may be so qualified by the necessities of the case as to warrant the exercise of territorial jurisdiction beyond that limit. So that our present claim is not a departure from our traditional policy, as English writers on this subject declare, but is merely the assertion of a right which we have never denied, but which we have seldom been called upon to affirm.

III.

Hitherto we have considered the question under the general rules of international law. But there are circumstances which give us peculiar rights in Behring Sea, and we can fairly claim jurisdiction over its waters within one hundred miles from land by virtue of immemorial use with the tacit consent of Great Britain.

It is admitted by VATTTEL, a strenuous advocate of the freedom of the sea, that the exclusive right of navigation or fishery in the sea, may be gained by one nation on the ground of immemorial use and lost by others by non-user, when such non-user assumes the nature of a consent or tacit agreement: *Droit des Gens*, book 1, ch. 23, §§ 279-286. This is indeed the foundation of all title to territorial jurisdiction whether on land or sea.

That our right to jurisdiction in Behring Sea outside the three-mile belt has this foundation, is matter of history.

In 1799, the Emperor PAUL, of Russia, asserted Russia's jurisdiction over Behring Sea, and the coast of North America down to the fifty-fifth degree of North latitude.

This claim, so far as I have been able to learn, was never disputed. In 1821, the Emperor ALEXANDER reiterated his father's claim, but instead of confining his jurisdiction to the bounds named in the ukase of 1799, he claimed, in addition to Behring Sea, all the land and water lying North of a line drawn due East from the Southern extremity of the Aleutian Islands in latitude 51° , thus taking in the entire coast of North America down to a point not far from the present Northern boundary of the State of Washington, and all that part of the ocean lying East of Behring Sea. To appreciate the difference between the claim asserted in 1799 and that put forward in 1821, we must remember that the curve of the Aleutian Archipelago forming the Southern boundary of Behring Sea, swings so far to the South that the Southernmost island of the group, in latitude 51° , lies due West of Vancouver's Island, and that while Behring Sea is a body of water having well defined boundaries, being cut off from the Pacific Ocean by the chain of the Aleutian Islands, the water East of Behring Sea is part of the Pacific Ocean with nothing but an imaginary line to separate it from the rest of the ocean. The United States protested against this unwarranted extension of Russian territory, asserted their right of navigating the Pacific Ocean, denied Russia's title to control the ocean, and obtained a treaty from Russia conceding freedom of navigation in the North Pacific. But neither the United States nor England ever denied Russia's claim to jurisdiction over Behring Sea or objected to her exercise thereof. In 1825, Great Britain entered into a treaty with Russia, in which freedom of navigation in the North Pacific was conceded and the boundary line between Russian and British America was defined, but in which no provision was inserted which in any way modified or denied Russia's claim of jurisdiction over Behring Sea. It is also noteworthy that while England reserved the right of navigating to their mouths all rivers rising in her territory and flowing through the Russian possessions into the Pacific Ocean, no such right was reserved as to the great Yukon River, a stream eighteen hundred miles long, which rises in British territory and

empties into Behring Sea. Why was not the right of navigating this river reserved by England unless because Behring Sea, into which it flows, was recognized as Russian property?

In 1867, Russia ceded Alaska to the United States, and with it transferred all her rights in that part of Behring Sea lying within the ceded territory. And until 1886, no attempt was made by the subjects of Great Britain to hunt seals in Behring Sea. In view of these facts, it does not seem strange that the British government has found no adequate answer to Mr. Blaine's question:—

Whence did the ships of Canada derive the right to do in 1886 that which they had refrained from doing for nearly ninety years?

The Russian ukase of 1821 did not wholly close Behring Sea against the ships of foreign nations, but it did forbid all foreign ships from approaching within one hundred miles of the shore, a regulation which subsequent experience has shown to be necessary to preserve the seals from extermination. Both the United States and Great Britain recognized, respected and obeyed this ukase as long as Alaska remained Russian property. For nineteen years after the session to the United States, England did not infringe its restrictions. That it was a wise regulation is shown by the fact that it has secured the preservation of the seal fishery. That it was a just one, is shown by the fact that it was universally acquiesced in for nearly ninety years. That it was a lawful one under the principles of international law, it has been the object of this article to prove. If it is wise, just and lawful, it is clearly the duty of the United States to enforce it.

Chicago, Ill.

LOUIS BOISOT, JR.

Supreme Court of Minnesota.

STREISSGUTH ET AL.

v.

NATIONAL GERMAN-AMERICAN BANK.

When a bank receives a draft for collection, it enters into an implied contract to perform such duties as are necessary for the protection of the customer.

A bank is not exempt from the principle of law, that every person is liable for the acts of such agents as he appoints to transact the business he undertakes to perform.

Appeal from District Court of Ramsey County; BRILL, Judge.

The complaint set forth that the defendant was a banking corporation organized and doing business in St. Paul, Minnesota, as a national bank, and that the plaintiffs were merchants, copartners engaged in business at St. Paul. That it had been the custom and usage of the defendant for more than five years past to receive from its customers and patrons, among whom were the plaintiffs, for collection and to collect for them, all drafts and checks left with it for collection, and in collecting the same from parties at a distance, to transmit the same to the correspondents and agents of the defendant, located and doing business in the vicinity of and generally nearest to the party or parties from whom such collections were to be made. In November, 1888, the plaintiffs drew their draft upon Kelley and Riley, merchants at Lake Crystal, Minnesota, for the sum of one hundred and thirty-seven dollars and fifty-two cents, payable at sight, and delivered the same to the defendants for collection, who agreed to collect the same, the draft being made payable to their order. The defendant forwarded the draft to its correspondent and agent, the State Bank at Lake Crystal, for collection, who presented the same and received the amount therein stated to be paid. After the amount had been paid to the Lake Crystal Bank, it became insolvent, and never paid and was wholly unable to pay the amount or any part

thereof. The plaintiffs had made repeated demands for payment of the sum collected, but the defendant refused to pay, and this action was brought to recover the amount of the draft together with interest, costs and disbursements.

The defendant denied that it had been its custom to collect all checks and drafts left with it for collection, or to guarantee the collection thereof, or to do more than use due diligence and exercise ordinary prudence in making efforts to collect the same, and also, that it ever had any correspondents or agents for the transaction of such business, but, whenever such paper was received for collection, it had forwarded the same to the nearest bank of good standing and credit to the party or parties from whom such collections were to be made, and if collected, to receive the proceeds of said drafts or checks and pay them over to their customers, or carry the proceeds thereof to the credit of customers on their books, as directed. Defendant also denied that the State Bank was its agent, and alleged that at the time the draft was forwarded it was a State bank of good standing and credit, and averred the exercise of ordinary care and prudence, and that the collection was in its ordinary course of business. There was also a denial of the receipt of any consideration whatever, such collections being merely for the convenience of customers.

The Court found that the State Bank at Lake Crystal was the sub-agent of the defendant, and that the defendant was liable for its default in failing to pay over the money collected by it, and gave judgment for the plaintiffs.

J. B. & W. H. Sanborn, for appellant.

Young & Lightner, for respondents.

COLLINS, J., Feb. 24, 1890. The single question presented by this appeal is whether a bank, with which a customer has left for collection his draft upon a party residing at some distant point, can be held responsible for the failure and default of a correspondent to whom the bank has forwarded the draft for collection. It must be admitted that there is apparently a great conflict of precedents upon this precise ques-

tion, and it is possible that, as contended by the appellant, the weight of the authorities, numerically speaking, is with the proposition that when, under such circumstances, a bank has exercised ordinary care and prudence in the selection of a correspondent to whom it transmits a draft, bill, or note for collection, and remittance of the proceeds, its liability terminates, because, as it is necessary and customary, and in the usual course of business, for banks to collect through correspondents, of which necessity, custom, and course of business the owners and holders of paper have full notice and knowledge, it must be held that they have assented to, and authorized the work of collection through others. The question involves a rule of general application and of commercial law. As it concerns trade between different and distant places, and, in the absence of a statute or contract or usage which has obtained the force of law, is not to be determined according to the views or interests of any particular persons, classes, or localities, it should be decided according to those principles which govern and best promote the general welfare of the entire commercial community, and in accordance with the general principles which apply to all who contract to perform a service.

When the appellant received the draft for collection, it entered into a contract, by implication, to perform such duties as were necessary for the protection of its customer. It agreed to collect the paper itself, not to procure the services of another to make the collection. The plaintiffs had no voice in the selection of appellant's agent or correspondent, and it is difficult to see why banks and banking-houses should be excepted from the operation of a cardinal and well-established principle of law that every person is liable for the acts of such agents as may be appointed or designated by him to transact such business as he has undertaken to perform for others. The appellant, having undertaken the collection of the paper, stands in the attitude of an independent contractor who, having unrestrained liberty so to do, has designated a sub-agent, and is therefore answerable for his neglect, failure or default. It is true that in the adjudicated

cases cited by the appellant strong arguments are found, and cogent reasons stated, in support of its position; but we are of the opinion that the conclusion we have reached is the sounder one upon principle. It is also sustained by the Supreme Court of the United States, and the courts of last resort of several of the States, including that of the great commercial center, New York. It is also the rule in England: *Exchange Nat. Bank v. Third Nat. Bank* (1884), 112 U. S. 276; *Allen v. Bank* (1839), 22 Wend. (N. Y.) 215; *Ayrault v. Bank* (1872), 47 N. Y. 570; *Simpson v. Waldbury* (1886), 63 Mich. 439; *Titus v. Bank* (1871), 35 N. J. Law, 588; *Reeves v. Bank* (1858), 8 Ohio St. 465; *Tyson v. Bank* (1842), 6 Blackf. (Ind.) 225; *Express Co. v. Haire* (1863), 21 Ind. 4; *Mackersy v. Ramsays* (1843), 9 Clark & F. 818; *Van Wart v. Woolley* (1824), 3 Barn. & C. 439.

Judgment affirmed.

The law upon the question of the liability of a bank for the acts of its correspondents is in an unsatisfactory state, yet it would seem that the principal case, although not supported by the weight of authority declares the better law.

It is a general rule of law, that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit, for the acts or misdeeds of his agent, unless, indeed he has authorized or co-operated in those acts or misdeeds; yet, he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them: Story on Agency § 452.* The maxim is "*respondeat superior*," and as ex-

pressed by Lord Chief Justice KENYON in *Ellis v. Turner* (1800), 8 Term. 533,—“The defendants are responsible for the acts of their servants in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect their duty to them:” This liability of the principal for the misfeasances, and negligences, and torts of his agents and servants, extends not only to the injuries and wrongs of the agent who is immediately employed by the principal in a particular business, but also to the injuries and wrongs done by others, who are employed by that agent under him, or with whom he contracts for the performance of the business; for the liability reaches through all the stages of the service: Story, § 454.

The law, as thus defined, was applied in the principal case to a bank, with which a customer had left for collection, his draft upon a party residing at a distance. In principle.

as well as theory, it would seem that such decision is correct, for the maxim, *respondet superior*, is of universal application, and *qui facit per alium facit per se*, is the rule applicable to all cases in which one engages another to perform an undertaking or a service for him. Notwithstanding this, however, the courts in this country are much divided in opinion upon the question, and numerically speaking, their decisions may be said to be against the principle above laid down; so much so, that only five of the States support this ruling; yet the fact must not be lost sight of, that their decisions although in the minority are supported by the Supreme Court of the United States.

The theory contended for by the bank in the principal case, and supported by the majority of the decisions in the State Courts, is, that a home bank, receiving from its customers foreign paper for collection, is relieved from liability, if, in the selection of its correspondents to whom it entrusts its business, it exercises due care and prudence, and gives proper instructions to collect and remit.

The courts which support the latter doctrine do so on the ground, that the customer has a perfect knowledge of the usage and custom of banks, that correspondents will be selected, and impliedly authorizes the employment of a sub-agent, and that being so selected and employed, there is a privity between the customer and the sub-agent, which relieves the bank first intrusted from all liability. They likewise draw a distinction between the case of a home and that of a foreign bill. They admit that in the former case the bank would be liable for the acts and defaults of its

servants or agents to whose care such paper is consigned for collection, yet deny that the same principles of law should govern the latter case, and that upon the ground of usage and knowledge and implied authority as above stated. It is submitted that such distinction is not feasible and that it is contrary to all sound principles of law. Why should a person be made liable for the acts of his agents or servants in one case and not in the other? It would seem that the foreign correspondent is as much the agent of the bank as one of its home officers is. In each case the bank employs some agent or servant to transact its business, and therefore the same principles ought to apply in both cases.

The question of consideration has been urged as an answer to this theory, and on this ground, namely, that in the case of a home bill, the bank receives the commission on collection, while in that of a foreign one the correspondent receives it; thus in *Titus & Scudder v. The Mechanics' National Bank* (1871), 35 N. J. Law (6 Vroom.) 588, it was relied upon by the defendant, but the Chancellor held the point was not well taken as "the consideration set forth and proved that the plaintiffs were dealers in the bank, and kept their deposits there, and gave their checks upon New York, by which the defendants had the advantage of the rate of exchange, or the greater value of funds in New York than at Trenton is a sufficient consideration." In the case of *Allen v. The Merchants Bank of the City of New York*, *infra*, page 644, the same doctrine is upheld, and in the case of *Exchange National Bank v. Third National Bank of the City*

of *New York, infra*, page 647, the theory is supported by the Supreme Court of the United States. There would therefore seem to be no reason for holding the want of consideration a defense to such an action.

The question may be looked at from another point of view, namely, that of an attorney at law, or a collection agency. In these cases the law is well defined. They are liable for the acts of their correspondents to whom they transmit debts for collection, unless, as in the case of *Bullitt v. Baird* (1870), 28 AMERICAN LAW REGISTER N. S. 546, they expressly limit their liability by their receipt: *Pollard v. Rowland* (1826), 2 Blackf. (Ind.) 22; *Bradstreet et al. v. Everson et al.* (1872), 72 Pa. 124. It is difficult to conceive why the case of a bank should be looked at in a different light, for its position is in all points similar to that of an attorney and a collection agency. They both undertake to transact the same business, namely, the collection of money due from one person to another. That no such distinction really does exist, is clearly pointed out by the dissenting opinion of Chief Justice CAMPBELL, in *Third National Bank of Louisville v. Vicksburg Bank* (1883), 61 Miss. 112: "It seems to be well settled that a collection agency which takes a claim for collection at a distant point, is responsible for the acts of its agent to whom the claim is sent for collection. I am not able to draw a distinction between a collection agency, by that name, and a bank, which is a collection agency, where it undertakes to collect claims for customers;" and by the case of *Hoover v. Wise et al.* (1876), 1 Otto, (91 U. S.) 308, where the action was brought to recover back

a sum of money collected from the bankrupt after the occurrence of several acts of bankruptcy. It appeared that an account was delivered by its owners to a collecting agency in New York, and received by them, with instructions to collect; that they transmitted the claim to a firm of practicing attorneys in Nebraska, who persuaded the debtor, notwithstanding the acts of bankruptcy, to confess judgment, which he did, and the money was collected and remitted to the agents in New York, but never paid to defendants. The debtor was declared bankrupt within four months after such confession and the attorneys were aware of his condition at the time. Justice HUNT delivered the opinion of the Court and after reviewing the authorities remarked: "The cases show that where a bank, as a collection agency, receives a note for the purposes of collection, its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated are its agents, and not the sub-agents of the owner of the note. It is not perceived that it can make any difference that such collection agency is composed of individuals, instead of being an incorporation. These authorities go far towards establishing the position that Archer & Co. [the collection agents] in the case before us were independent contractors, and that the parties employed by them were their agents only and not the agents of [defendants] in such manner that [defendants] are responsible for their negligence or chargeable with their knowledge. * * We are of opinion that these authorities fix the rule in the class of cases we are now considering, to wit: that of attor-

neys employed not by the creditor, but by a collection agent who undertakes the collection of the debt. They establish that such attorney is the agent of the collecting agent, and not of the creditor who employed that agent.

A distinction has been drawn by the Courts between those cases in which the bank receives the paper merely for the purpose of transmission, and those in which it has received it for collection. They hold that in the former case the fact of receiving the documents for transmission for collection only, limits the responsibility to good faith and due discretion in the choice of an agent, while in the latter their opinions differ.

The question therefore would seem to be one of contract, namely, what is the real contract entered into between the parties? Is the contract only for the immediate services of the agent, and his acting faithfully, or, does it look to the thing to be done? If it be for the former, then responsibility ceases with the limits of the personal services undertaken, while if the latter, it covers all necessary and proper means for accomplishing the object, by whomsoever used or employed: *Allen v. The Merchants' Bank of the City of New York*, *infra*, page 644; *Titus & Scudder v. The Mechanics' National Bank*, *infra*, page 643; *Exchange National Bank of Pittsburgh v. Third National Bank of the City of New York*, *infra*, page 647; *The Bank of Washington v. Triplett & Neale*, *infra*, page 656; *The Mechanics' Bank of Philadelphia v. Earp*, *infra*, page 654; *Bellefleur v. The Bank of the United States*, *infra*, page 654; *Wingate v. The Mechanics' Bank*,

infra, page 655; and *Merchants' National Bank of Philadelphia v. Goodman*, *infra*, page 656.

Notwithstanding these distinctions have been so clearly defined, they do not seem to be fully understood or followed by the Courts of some States, especially those of Illinois. This is indicated by the case of *The Aetna Insurance Co. v. The Allon City Bank*, *infra*, page 650, the agreed facts of which showed that the bill in question was "received for collection," and not merely for "transmission for collection," in which light it was treated by Justice WALKER who referred to the cases, *The Bank of Washington v. Triplett & Neale*; *Allen v. The Merchants' Bank of New York City*, *infra*.

In many cases, the negligence complained of, has been that of a notary employed by the bank, and the point has been successfully taken, that for such acts, the notary being a commissioned public officer appointed by the executive authority of the State, the bank was not liable. Here, again, the authorities differ, some cases drawing a distinction where such laches were committed by him in that part of his office which is peculiarly official, holding that in such case alone would the bank be relieved from responsibility: *Allen v. The Merchants' Bank of New York City*, *infra*, page 644, in these words: "If this laches had been committed by that officer in that part of his duty which was peculiarly official, and could only be performed by himself or some other notary, he having been requested or instructed to perform such duty, I doubt whether the collecting bank or any other institution or person employing him, would be responsible for

his neglect in that which was not voluntarily confided to him, but wherein his official duties were rendered necessary by the requirements of the law; and where his employer had done all that was within his power for the performance of the original undertaking. Then it would seem that the notary would alone be responsible."

In considering this subject which involves principles governing a wide range of commercial interests, sight must not be lost of the question of public policy. Upon this phase of the question, Senator VERPLANCK, in *Allen v. Merchants Bank of New York*, *infra*, remarks: "I cannot but think that if the law of this case were now to be settled, not judicially, but legislatively, upon considerations of public policy alone, the doctrine I have maintained * * would be found the safest and wisest. If the present judgment be affirmed, no small doubt will be thrown upon the responsibilities of collecting banks and bankers, even in domestic collections, for the acts of any of their officers. As in the case of corporate banks, or those under our general law, all the business is practically done by agents, that doubt would cover the whole of our banking transactions. The same difficulty may arise in numerous analogous commercial affairs, the law as well as the usage of which is now settled, unless it be shaken by the influence and authority of decisions and reasoning like that of the Supreme Court in this case. On the other side, if we hold collecting banks and bankers, to be liable for all neglect or omission of the necessary and proper means for the due performance of that which they have in general terms under-

taken to do, whether such omission or negligence be their own or that of others in their employ, we preserve that harmony of the law which is so essential to its being understood by those who are to regulate their dealings by it; and unquestionably much doubt and litigation will be excluded. If the responsibility thus imposed be onerous or inconvenient as to foreign bills, or to any special class of transactions, it is very easy for banks and bankers to avoid that inconvenience by stating the terms upon which they will receive the deposited paper."

The English cases establish the doctrine of principal and agent between the parties, and hold the bank liable for all acts of its sub-agents: *Mackersy v. Ramsays* (1843), 9 Cl. & F. 818; and *Van Wort v. Woolley and others* (1824), 3 B. & C. 439; which are much relied on by the Courts in this country. In the former case it appeared that the defendants in the way of their business as bankers, were employed, for reward, by a customer with whom they had a cash account, to obtain payment of a bill of exchange drawn on a person in Calcutta payable to their order. The defendants employed agents, who in turn employed others; the bill was duly paid to the latter, who after giving their direct employers credit for it, became bankrupt. The Court held the defendants liable. Lord CAMPBELL, thus stating the law: "The general rule of law, that an agent is liable for a sub-agent employed by him, is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself without employing a sub-agent; and here I conceive that the money is to be considered as received by

[the agent] whose correspondents actually received it, and credited them with the amount * * before their failure." To Lord COTTENHAM's mind, it was "not necessary to go deeper than to refer to the maxim "*qui facit per alium, facit per se*," to solve the question. In the latter case, Chief Justice ABERTY proceeded as follows: "Upon these facts, it is evident that the defendants (who cannot be distinguished from, but answerable for their London correspondents * *) have been guilty of a neglect of duty which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff is therefore entitled to maintain his action against them, to the extent of any damage he may have sustained by their neglect."

The *Indiana* courts hold the bank liable, and follow the English cases. In *Tyson v. The State Bank of Indiana* (1842), 6 Blackf. (Ind.) 225, the bank, through one of its branches, had undertaken to collect the plaintiff's debt, but neglected to do so, and the Court held it liable, Justice SULLIVAN saying: "The State Bank, through one of its branches, having undertaken, for a reasonable reward, to collect the plaintiff's debt, placed itself in the situation of an agent or attorney, who, for reward, undertakes to perform services for another in the line of his business or profession. He is bound to a faithful discharge of his duty, and is responsible to his employer for all damages arising from his neglect." In *The American Express Company v. Haire and others* (1863), 21 Ind. 4, the bill was a foreign one, and was handed to the company for collection. The company handed it to

the notary who failed to demand and protest the bill at the proper time. Here the Court followed the New York case of *Allen v. The Merchants' Bank*, *infra*, and held the company liable for the acts of its agent. The case of *Tyson v. The State Bank of Indiana*, *supra*, was cited and approved. *Chapman v. McCrea, et al.* (1878), 63 Id. 639, is to the same effect.

The law upon the question seems to have remained unsettled in *Michigan* until the case of *Simpson v. Waldby & Clay* (1886), 63 Mich. 439, came before the Supreme Court of that State. The action was brought to recover a balance claimed to be due from the defendants to the plaintiff in respect of five drafts drawn by the latter upon a party in Vermont. The drafts were made payable to the order of the defendants, who undertook the collection of the same, and forwarded them to the First National Bank at St. Albans, who after collecting, sent its own draft on New York to defendants for the money. It appeared that a large number of drafts had been drawn by and upon the same parties before, and collected in the same manner. The defendants claimed that the amounts of the last three drafts were never received by them owing to the failure of the St. Albans bank, as a draft or drafts of that bank upon New York received by them was protested and not paid in New York. In the opinion Justice MORSE says: "The question is * * directly before us. What is the law of the case when a person steps into a bank, in the ordinary course of business dealings, and entrusts to it the collection of a draft drawn upon some person residing at a distance, in case the home bank, through the

failure or dishonesty of another bank, selected by itself, never receives the money upon such draft, though the same is paid by the drawee? In the absence of any agreement in regard to the matter, who must bear the loss in case the home bank has not been at fault in the selection of its agent or agents? There is a conflict of authority upon this proposition, and, as it has never been settled in this State, we must be guided and governed in our action by what seems to us the most correct view in justice and on principle." After reviewing the authorities, and especially the case of *Mackersy v. Ramsay*, *supra*, he continues: "the ruling in that case squarely covers the point in issue here, and to my mind is the better doctrine, and most in accord with principle. The learned jurists holding otherwise all admit that if a person entrusts a home draft or bill to a bank for collection, such bank is responsible to the customer for any negligence or default of its agents, officers or employees. I cannot see why any different rule should prevail in the collection of a foreign bill. It is, in every case that I have examined, sought to be maintained upon the theory that the customer knows the bank must act through some other person or persons at a distance, and therefore impliedly from the very nature of the course of business, assents to the employment of such persons and makes them his agents. This reasoning does not strike me as sound. If I leave an indorsed note against persons in my own town for collection and consequent demand and protest, I know that some agent or employe of the bank will do the work or some part of it, and I do not know or inquire who will do it.

I contract, however, with the bank that suitable agents will be employed, and hold it responsible for their acts. The law authorizes me to do this. If I entrust the same bank with the collection of a foreign draft, I also know that they will employ some agent or correspondent abroad of their selection, not mine, of whom I know nothing and with whom they are supposed to have business relations. I do not inquire whom they are to select. I presume, and have a right to presume, that they have business knowledge of such agent or agents, which I do not and cannot possess, by the very course of their dealings as bankers. In each case, the bank holds itself out for a consideration to collect my paper, and it can make no difference whether the compensation is great or small. In each case, it selects its own agents in the premises. In each case, I have no part in or control over such selection. In each case, there is no privity between the party selected and myself. I fail to perceive why in the one case more than the other I adopt the immediate party collecting or protesting the bill as my agent. I cannot find any good reason for making this particular case of the collection of a foreign bill, an exemption to the general rule of agency."

The *New Jersey* decisions follow those of New York. In *Titus & Scudder v. The Mechanics' National Bank* (1871), 35 N. J. Law (6 Vroom) 588, after duly considering the previous cases upon the question *pro* and *con*, the Chancellor expressed himself thus: "In this conflict of authorities, the weight of mere numbers ought not to govern. We should rather look for authority to those courts which

usually decide upon principles acknowledged by the courts of this State, and by whose decisions we are accustomed to be guided. The courts of England are the sources from which we derive our legal maxims, and those of New York have adhered more closely to the rules of the common law which are our guide, than courts of other States. But this consideration alone is not sufficient to determine a question like this; we must look to the principles adopted by us which control it. One cardinal and well-established principle is, that every one shall be liable for the acts of his agents chosen by himself. This, when applied to such a case is founded in equity and good sense. A dealer who deposits a draft on a distant city, in a bank in his own town, has no choice of their agent or correspondent. It is the business of a bank to provide proper agents or correspondents for this service, when they adopt it, as most banks do, as part of their regular business."

In *New York* the matter has been very much debated upon, but seems to be settled in favor of the liability of the bank for the acts of its correspondent. In the case of *Allen v. The Merchants' Bank of the City of New York* (1839), 22 Wend. (N. Y.) 215, the bench was composed of the Chancellor and twenty-three Senators, who were divided in opinion, fourteen being in favor of the liability of the bank and ten against it, the Chancellor being one of the minority. The case had been decided in the Supreme Court of that State and verdict given in favor of the bank in 1836, 15 Wend. (N. Y.) 482, and the plaintiff appealed. The decision was reversed, Senator VXR-

PLANCE putting the case as follows: "A bill of Exchange drawn in New York upon a person resident in Philadelphia, is deposited *for collection* in a New York bank, is received for that purpose, and duly transmitted to their correspondent and agent, a Philadelphia bank, the notary of which is guilty of a neglect, whereby on refusal to accept at Philadelphia, payment from the New York drawer or endorser is lost. Is the New York bank first receiving this paper for collection, responsible for the loss or damage arising from the default of its Philadelphia agent? It is well settled in this State that there is an implied undertaking by a bank or banker receiving negotiable paper deposited for collection, to take the necessary measures to charge the drawer, maker or other parties, upon the default or refusal to pay or accept. The ground of this rule is, that the acceptance of negotiable paper thus deposited for collection forms an implied undertaking to make the demands and give the notices required by law or mercantile usage for the perfect protection of the holder's rights against all previous parties; for which undertaking the use of the funds thus temporarily obtained or of the average balances thereof, for the purposes of discount or exchange, forms a valuable consideration. Had we no express authority on this head, I should consider the acceptance by a bank of paper for collection from a customer, in the usual course of his business, as sufficient evidence of a valuable consideration. The whole ordinary business of a bank with its dealers, is one of mutual profit or accommodation, and must be taken together (unless some part is separated by

express understanding) and it is not for a bank to allege or for a Court to consider * * that a collection in a particular place must be regarded as a gratuitous favor. If accepted at all, the general profits and advantages of the business, of which this may perhaps be an unproductive part, form a good consideration for the undertaking. This, however, is not an open question, after the decision of this Court in the two cases against the Bank of Utica." [*Snedes v. Bank of Utica* (1823), 20 Johns. (N. Y.) 372; *S. C.* (1824), 3 Cowen (N. Y.) 662; and *McKinster v. Bank of Utica* (1832), 9 Wend. (N. Y.) 473.] He points out the wide difference existing, as well by positive law as by reason of the thing itself, between a contract or undertaking to do a thing, and the delegation of an agent or attorney to procure the doing the same thing, the contract or being bound to answer for any negligence or default in the performance of his contract, although such negligence or default be not his own, while the mere representative agent, discharges his whole duty if he acts with good faith and ordinary diligence in the selection of his materials, the forming of his contracts and the choice of his workman, and continues thus: "Now in the case of the deposit for collection of a domestic note or bill payable in the same town, no one can imagine that this, instead of being a contract with the bank to use the paper, is a mere delegation of power to act as an attorney for that purpose. If this were so, and it should happen that by the fraud, the carelessness, or the ignorance of a clerk or teller, the only responsible parties were discharged, or the note itself lost or destroyed,

it would be a sufficient defense for the bank if it could show that the directors had employed ordinary care and caution in selecting their officers; or any similar defense which would be good in the mouth of an attorney in fact, or a steward acting in good faith for his principal, who had been defrauded in any transaction. * * The natural and general understanding of men of business is * * that of an implied agreement with the bank itself, of whose officers and agents they have no knowledge, and with whom they have no privity of contract * * Is there anything in the mere fact of the paper being payable in another city, and therefore requiring the aid of other agents, sufficient to take that case out of the general rule? In the deposit of a note for collection, payable in the same place, the holder is equally aware that the bank cannot personally attend to the collection, and its management must be left to some one or more competent agents. But he makes an implied contract with the bank that the proper and expedient means shall be used to collect his note. So he does as to a foreign debt; and in each case he alike presumes that proper agents will be employed. In neither case has he any knowledge of the agents or privity with them. I can perceive no reason for liability or exemption from liability in either case which does not equally apply to the other." He draws a distinction between cases where the bank receives the paper merely for transmission to its correspondents and cases in which it receives for collection, saying: "The bank, if its officers think fit, and the dealer will consent, may vary that liability in either case. It may receive

understand that principle as an exception to the rule of the bank and to which business we are entitled to be guided. The rule of England and the custom here which we derive our legal system and that of New York are all alike more closely to the rule of the common law which are our guide than those of other States. But the construction does not suffice to determine a question like this we must look to the principles adopted by us which control it. Our settled and well-established principle is, that every one shall be liable for the acts of his agents chosen by himself. This when applied to such a case is founded in equity and good sense. A dealer who deposits a draft on a distant city in a bank in his own town, has no choice of their agent or correspondent. It is the business of a bank to provide proper agents or correspondents for this service, when they adopt it, as most banks do, as part of their regular business."

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the paper only for transmission to its correspondents. That would form a new and different contract, and would limit the responsibility to good faith and due discretion in the choice of an agent. But if this be not done, or unless there be some implied understanding on the subject, I see no difference between the responsibility assumed in the undertaking to collect foreign bills, and that for collecting domestic paper, payable at home. It is assumed in the same manner, in the same words and in the same consideration."

The proper construction to be put upon all questions of this kind is expressed by the same learned Judge in these words: "In all these cases, we are not to look to the necessity of the employment of distant or under agents. We are to look to the contract itself. *Legem enim contractus, dat.* We are to look whether the contract be only for the immediate services of the agent, and his acting faithfully as the representative of his principal, doing for him, in the business confided to his care, what the principal is not able or willing to do for himself, or whether the contract looks mainly to the thing itself to be done, and the undertaking be for the due use of all the proper means for its performance. In the one case, the responsibility ceases with the limits of the personal services undertaken; in the other, it extends to cover all the necessary and proper means for the accomplishment of the object, by whomsoever used or employed." The case of *Ayrault v. The Pacific Bank* (1872), 47 N. Y. 570, is to the same effect.

The same doctrine prevails in *Ohio, Reeves, Stephens & Co. v.*

The State Bank of Ohio (1858), 8 Ohio St. 465, being the leading case. In it, Justice BRINKERHOFF considers the opinions in the New York case of *Allen v. The Merchants' Bank of New York*, *supra*, very fully and upholds the decision in that case: "On the whole looking at the question in the light of principle, and of what seems to us to be a sound legal policy, we prefer to adopt the doctrine of the Courts of England and New York, as now established."

The rule in *South Carolina* would seem to follow that of New York, for in the case of *Thompson v. The Bank of the State of South Carolina* (1836), 3 Hill (S. C.) 77, where the plaintiff deposited a note, endorsed to him by the payee in the branch bank at Camden for collection. At maturity, it was not paid and was protested for non-payment by the bank notary, but no notice was given to the indorser or to the plaintiff who brought action, for the non-performance by the bank of its undertaking to collect, and to give notice to charge the indorser. In delivering the opinion of the Court, by which the bank was held liable, Justice EARLE said, "Whosoever undertakes an agency, engages likewise to employ an adequate degree of skill, and to use a reasonable degree of diligence. In this case, the bank engaged for the exercise of so much skill, in the particular part of business, as to perform the duty of collecting the note; and * * of doing whatever was necessary to charge those to whom the plaintiff might resort for payment; and * * that it would omit nothing which reasonable diligence would enable it to perform."

The rule as established by the preceding decisions, is supported by

those of the Supreme Court of the United States. In *Exchange National Bank of Pittsburgh v. Third National Bank of the City of New York* (1884), 112 U. S. 276, the action was brought to recover damages for the alleged negligence of the defendant in regard to eleven drafts or bills of exchange, endorsed by the plaintiff to the defendant for collection. The facts showed that the drafts were drawn at Pittsburgh, to the order of one Baldwin and by him endorsed, on a company in New Jersey; that they were discounted before acceptance, by the plaintiff for the drawers; that they were transmitted for collection, before maturity by the plaintiff to the defendant; that they were sent by the defendant to its correspondent, the First National Bank of Newark; that the drafts were presented; that they were addressed to "Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J."; that the acceptance was made by Conger in his own name, as follows: "Accepted, payable at the Newark National Banking Co. Walter M. Conger," that when the acceptance was taken, the time of payment was so far distant that there was sufficient time to communicate to the plaintiff the form of the acceptance, and for the plaintiff thereafter to give further instructions as to the form of acceptance; that the Newark bank held the drafts for payment, but the plaintiff was not advised of the form of acceptance until some time afterwards, and two of them were returned to it by the defendant, the drawers and endorsers being then insolvent. The negligence alleged was the not obtaining acceptance of the drafts by the company, or having them protested for non-acceptance by it, or giving no-

tice to the plaintiff of such non-acceptance, and in failing to give notice that the company would not accept, or that Conger would not accept them in his official capacity. The elaborate opinion of the Court, examining all the previous decisions both in this country and in England, was delivered by Justice BLATCHFORD: "The question involves a rule of law of general application. Whatever be the proper rule, it is one of commercial law. It concerns trade between different and distant places and in the absence of statutory regulations or special contract or usage having the force of law, it is not to be determined according to the views or interests of any particular individuals, classes or localities, but according to those principles which will promote the general welfare of the commercial community. Especially is this so when the question is presented to this tribunal, whose decisions are controlling in all cases in the Federal Courts.

"The agreement of the defendant in this case was to collect the drafts, not merely to transmit them to the Newark Bank for collection. This distinction is manifest; and the question presented is, whether the Newark Bank, first receiving these drafts for collection is responsible for the loss or damage resulting from the default of its Newark agent. There is no statute or usage or special contract in this case, to qualify or vary the obligation resulting from the deposit of the drafts with the New York Bank for collection. On its receipt of the drafts, under these circumstances, an implied undertaking by it arose, to take all necessary measures to make the demands of acceptance necessary to protect the rights of the holder

against previous parties to the paper. From the facts found, it is to be inferred that the New York Bank took the drafts from the plaintiff, as a customer, in the usual course of business. * * The taking by a bank, from a customer, in the usual course of business, of paper for collection, is sufficient evidence of a valuable consideration for the service. The general profits of the receiving bank from the business between the parties and the accommodation to the customer, must all be considered together, and form a consideration, in the absence of any controlling facts to the contrary, so that the collection of the paper cannot be regarded as a gratuitous favor. The contract then, becomes one to perform certain duties necessary for the collection of the paper and the protection of the holder. The bank is not merely appointed an attorney, authorized to select other agents to collect the paper. Its undertaking is to do the thing and not merely to procure it to be done. In such case, the bank is held to agree to answer for any default in the performance of the contract; and whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing sub-agents to perform a part of what it has contracted to do, becomes responsible to its customer. This general principle applies to all who contract to perform a service." Continuing, he adds: "The distinction between the liability of one who contracts to do a thing and that of one who merely receives a delegation of authority to act for another is a fundamental one, applicable to the present case. If the agency is an

undertaking to do the business, the original principal may look to the immediate contractor with himself and is not obliged to look to inferior or distant under contractors or sub-agents, when default occurs injurious to his interest." Alluding to the means whereby a bank may relieve itself of this responsibility the same learned judge says: "Whether a draft is payable in the place where the bank receiving it for collection is situated, or in another place, the holder is aware that the collection must be made by a competent agent. In either case, there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of its owner, that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in the one case which does not apply to the other. And while the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent and thus make a different contract and become responsible only for good faith and due discretion in the choice of an agent. If this is not done or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home. On any other rule, no principal contractor would be liable for the default of his own agent, where, from the nature of the business it was evident he must employ sub-agents. The distinction recurs between the rule of merely personal representative agency and the re-

sponsibility imposed by the law of commercial contracts. This solves the difficulty and reconciles the apparent conflict of decision in many cases. The nature of the contract is the test. If the contract be only for the immediate services of the agent and for his faithful conduct as representing his principal, the responsibility ceases with the limit of the personal service undertaken. But where the contract looks mainly to the things to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used."

In the case of *East Haddam Bank v. Scovil* (1837), 12 Conn. 302, a bill was drawn in Great Britain in favor of the defendant, upon merchants in New York, accepted by them, and subsequently endorsed by the defendant and one Ingham for the purpose of being transmitted to the plaintiff bank for collection, the sole interest being in the defendant, the endorsement by Ingham being merely for the purpose of accommodation. The plaintiff bank enclosed the bill with others and sent them to the Merchants' Exchange Bank of New York for collection. At maturity the bill was presented for payment, and being dishonored was protested, and due notice thereof given to the drawer, but none to the plaintiff, defendant or Ingham. Plaintiff subsequently credited the amount to Ingham, who drew his check in favor of defendant, which plaintiff honored. The acceptors of the bill were insolvent before the bill became due, and the plaintiff claimed the money as money paid under a mistake and misapprehension of facts, that

it had not been guilty of negligence or default of duty; that it was not by law bound or obliged to give any other notice to the defendant of the non-payment of the bill than that given; that if any other notice was by law necessary, the defendant had received it; that the Merchants' Exchange Bank was not the agent of the plaintiff in respect of this bill; and that the plaintiff was not liable for any default or negligence of that bank in regard to it, if any such default or negligence existed, which it denied: Justice HUNTINGTON in delivering the opinion of the Court in support of the theory that the Merchants' Exchange Bank was not the agent of the plaintiff, upon the ground that it was necessary to transmit to a reputable correspondent according to the usual course of business for collection, and that such facts were known to the defendant, remarks: "It cannot justly be claimed, that the plaintiffs should have become insurers against the defaults of their correspondents. Such a doctrine would be as inequitable, as it might be oppressive and ruinous to banks who are merely the medium through which the holders of bills and drafts payable in other States transmit them for collection. If they act in good faith in the selection of an agent to protect the interests of the holder of the bill, in cases where it is obvious an agent must be selected for such purpose, what principle of justice or commercial policy requires, that they should be held liable for any neglect of duty on the part of such agent? * * * The mode now adopted and in general use, is well calculated to insure collections with promptitude, at a trifling expense, and without trouble to the holder. It is highly reasonable he

should assume the risk of the defaults of the collecting agent, rather than the bank, who merely transmit the bill, and select the agent, with the consent of the holder, and with a perfect knowledge on his part that such selections must be made."

"The general duty of an agent who receives for collection a bill of exchange," says the Court in *Merchants' & Manufacturers' Bank v. Stafford Bank* (1877), 44 Conn. 564, "is to use due diligence in presenting the same for acceptance, and in presenting it for payment, if it has been accepted, and to give the holder and other parties to the paper, by the next day's post, the notices of dishonor required by law in case acceptance or payment is refused, and to give to his principal any special notice which is required by the terms of the instructions to the agent, or of the contract which the agent has entered into with his principal. The agent is also required to protest, in case of non-acceptance or non-payment, if protest is not forbidden, and to send the protest to the holder."

To this may be added, the remark of Justice ELLSWORTH in *The Bridgeport Bank v. Dyer* (1848), 19 Conn. 136: "No principle of law is better settled than that a known practice, or one belonging to a particular branch of business is sufficient evidence of the understanding of the parties, when contracting in relation to that business, unless there be evidence to the contrary."

In the case of *The Aetna Insurance Company v. The Allon City Bank* (1861), 25 Ill. 221, although the facts as agreed upon between the parties clearly showed that the bill in question was received for collection, Justice WALKER treated

it as if received for transmission for collection, and held the bank not liable for the acts of its correspondents. "When received for transmission, it [the bank] has fully discharged its duty by sending the instrument in due season to a competent reliable agent with proper instructions for its collection. This is manifestly the rule clearly announced in a large majority of the adjudged cases." This statement of the law is no doubt true where the bank receives the paper for transmission for collection, but not where, as the agreed facts in this case show, such paper is received for collection. The distinction is shown by the cases of *The Bank of Washington v. Triplett & Neale*, *infra*; *Allen v. The Merchants' Bank of New York City*, *supra*; and *Jackson v. The Union Bank*, *infra*; all of which are cited and referred to in the opinion. There is no doubt, however, that the learned Judge treated the bill as received for transmission, contrary to the facts, for in the last paragraph of the opinion he continues: "In this case it appears that the defendants received the bill in controversy for transmission for collection, and in due season forwarded it to their correspondents at the residence of the drawees. That they were competent and reliable, and that defendants in no way contributed to any loss that may have occurred. If, then, any liability has been incurred to the plaintiffs, it is by the St. Louis house, who became their agents, and not by the defendants." It may be difficult to define what amounts to a receipt for collection, and what is a receipt for transmission for collection, but still when the facts of the case absolutely

show that the document in question was received for collection there can be no reason for holding it as received for transmission only.

The case of *Fay & Co. v. Strawn* (1863), 32 Ill. 295, was one wherein the appellants were bankers, who had received from appellee a draft payable to appellants for collection, which they in turn had endorsed over to their correspondents, who failed three days after collecting the money without having remitted it to the appellants. The appellants were adjudged not liable, but it would seem solely on account of a special contract, for from the opinion it is gathered, that when first applied to, they positively refused to undertake the collection of the draft; when they were applied to a second time, they only agreed to send the draft forward, upon the condition that they were to incur no liability, and that the correspondents were to transmit the collection to the appellants by express.

The *Iowa* cases maintain the theory, that "The bank receiving the paper becomes an agent of the depositor with authority to employ another bank to collect it. The second bank becomes the sub-agent of the customer of the first, for the reason that the customer authorizes the employment of such an agent to make the collection. The paper remains the property of the customer, and is collected for him; the party employed with his assent, to make the collection, must therefore be regarded as his agent. A sub-agent is accountable ordinarily only to his superior agent when employed without the assent or direction of the principal. But if he be employed with the express or implied assent of the principal, the superior agent will

not be responsible for his acts. There is in such a case, a privity between the sub-agent and the principal, who must, therefore, seek a remedy directly against the sub-agent for his negligence or misconduct. These familiar rules of the law applied to the case, relieve it of all doubt when considered in the light of legal principles." BECK, J., *Guelick v. The National State Bank of Burlington* (1881), 56 Iowa, 434.

In *Hyde & Goodrich v. Planters' Bank* (1841), 7 La. 560, the action was brought to recover damages occasioned through the negligence of a notary, but the Court held it would not lie, as "to make the defendants responsible for his neglect of official duty on the part of the notary, would be rendering them the sureties of the officer; it would be changing the ground upon which alone they can be held liable, to-wit: that of negligence in the discharge of their duty to their principals." This is followed in *Baldwin v. The Bank of Louisiana* (1846), 1 La. Ann. 13.

In *Maryland*, the law would seem to be against the liability of the bank. In *Jackson v. The Union Bank of Maryland* (1823), 6 Har. & J. (Md.) 146, the plaintiff charged the defendant with negligence with reference to a bill of exchange drawn by the plaintiff upon a party in Washington, D. C., and placed in defendants' hands for collection. The bill was a foreign one and was forwarded by defendants to their agents in Washington. The demands for payment and protest were made on the fourth day according to the custom of the banks in the District. In the opinion of the Court, which discharges the defendants, Justice BUCHANAN dwells

upon the custom of the defendants to collect paper for their customers through the agency of other banks; also upon the fact that the plaintiff was a customer, "and must be supposed to have had a knowledge of the uniform and established mode of making such collections by the banks," further, he takes the point that "the placing" of the bill "with the defendants for collection was equivalent to an agreement that it should be sent by them for that purpose to some bank in the District of Columbia, * * their established agent, * * and if that agent did, in conformity with the custom * * neglect to cause demand and protest to be made on the proper day, the defendants are not chargeable with any negligence, or other improper conduct." *Similarly, Citizens' Bank of Baltimore v. Howell & Brothers* (1855), 8 Md. 530.

In *Fabens v. The Mercantile Bank* (1840), 23 Cush. (Mass.) 330, it was agreed, that the usage of the banks in Massachusetts, was to collect notes, the makers of which resided without the State, through some bank in the place of the maker's residence, if there were any bank in such place in good standing, and to transmit the notes to such bank for that purpose. A notice had always been posted up in the bank in question, "that the cashier may receive notes and bills of exchange for collection, for which neither the bank, nor any officer thereof shall be held accountable for any irregularity in notifying." Here Chief Justice SHAW said: "We think this question must depend upon the usage and custom of merchants and bankers, and the implied obligation upon the latter, resulting from their relations, as

no special contract was made, and no special instruction given in the present case. We think it very clear upon principle and authority that by a general usage, now so well understood as safely to be considered a rule of law, when a bank receives a note for collection, it is bound to use reasonable skill and diligence in making the collection, and for this purpose is bound to make a reasonable demand on the promisor and in case of dishonor, to give due notice to the indorsers, so that the security of the holder shall not be lost or essentially impaired by the discharge of indorsers. * * But it is equally well settled, that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance, is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as part of the same doctrine, it is well settled, that if the acceptor of a bill or promisor of a note, has his residence in another place it shall be presumed to have been intended and understood between the depositor for collection and the bank, that it was to be transmitted to the place of residence of the promisor, and the same rule shall then apply, as if on the face of the note it was payable at that place. * * We are therefore of opinion, that the defendants had performed their duty, when they transmitted the note to a solvent bank in good standing, and were not responsible for the misfeasance or negligence of that bank."

The case of *The Dorchester and Milton Bank v. The New England Bank* (1848), 1 Cush. (Mass.) 177, supports these principles. In that

case, it was contended by plaintiff's counsel that the defendant bank had no right to place the bills, which had been placed in its hands for collection, in the hands of another bank (the bills were payable at Washington and the defendants had no correspondents there), on the ground that an agent has no authority to delegate his authority to a sub-agent without the assent of his principal. This contention was, however, denied by Justice WILDE: "This, no doubt, is generally true, but when from the nature of the agency, a sub-agent or sub-agents must necessarily be employed, the assent of the principal is implied. * * If the defendants employed suitable sub-agents for that purpose, in good faith, they are not liable for the neglect or default of the sub-agents. * * The defendant's liability was limited to good faith and due discretion in the choice of an agent to transmit the bills, and to procure a remittance of the money when paid. * * The usage of a bank is binding on all persons dealing with the bank, whether they know of the usage or not."

The Courts in *Mississippi* hold that in the case of a receipt for collection, the bank is not liable: *Tiernan et al. v. Commercial Bank of Natchez* (1843), 7 How. (Miss.) 648, where a notary had been negligent in collecting a domestic bill; *The Agricultural Bank of Mississippi v. The Commercial Bank of Manchester* (1846), 7 S and M. (Miss.) 592, a case of a foreign bill; *Bowling v. Artunur* (1857), 34 Miss. 41, where it was held that the notary was liable directly to the payee. In *Third National Bank of Louisville v. Vicksburg Bank* (1883) 61 Miss. 112, Justice COOPER

followed the ruling in the previous cases, while Chief Justice CAMPBELL delivered a dissenting opinion: "I think the rule which prevails in England, and New York, New Jersey, and Ohio, and which is preferred by several eminent text writers, is the true one, and that a bank taking paper for collection is responsible for the default of its correspondent. I do not find fault with the cases cited from our own reports. They were where the claim was handed to a notary, and it was properly held that he was the agent, not of the bank, but of the owner of the paper, and that the bank was not responsible for the default of the notary. Where protest becomes necessary or proper, the paper must be handed to a notary, and the owner of the claim knows that, and is conclusively presumed to have authorized the bank to commit the paper to a notary if it should become necessary to protest it. * * * To this I agree, but I am unable to assent to the doctrine that a bank is not responsible for its own agents in the conduct of its regular business. It seems to be settled that a collection agency which takes a claim for collection at a distant point is responsible for the acts of its agent to whom the claim is sent for collection. I am not able to draw a distinction between a collection agency, by that name, and a bank, which is a collection agency, where it undertakes to collect claims for customers."

In the case of *Capitol State Bank v. Lane* (1876), 52 Miss. 677, the draft was a foreign one and was not protested, and the Court held the bank liable, saying: "As a legal proposition, it is undeniably true that a bank which receives a note or bill for collection is bound to use

due and proper diligence in making demand and giving notice and causing protest to be made, so as to hold all parties liable, and in default of such diligence, the bank itself becomes responsible to the party who deposited the note or bill."

The decisions in the State of *Missouri* also uphold the doctrine "that where the bank with which the bill or draft is placed or deposited for collection, uses due diligence and transmits the paper to a proper correspondent for collection, with proper instructions for the collection of the same, its responsibility is at an end, unless by some after act it makes itself responsible: *Daly v. Butchers' and Drovers' Bank* (1874), 56 Mo. 94. In this case, that of *Gerhardt v. The Boatman's Saving Institution* (1866), 38 Mo. 60, was much commented upon by the Court. It was a case where the defendants with whom the plaintiff kept his regular deposit account, had delivered to it negotiable promissory notes for collection. The defendant employed a notary to do all its notarial business, and had required him to to give a bond, and appointed him by the year. The action lay for his negligence in not giving notice of dishonor, whereby the endorser was discharged, and the Court held the defendant liable for his acts, stating that it "having appointed the notary by the year, and required a bond for the faithful performance of his duties, made him its agent and an officer of the bank," and cited in support of its opinion the passage from Story on Agency. § 452, *supra*. At the same time the Court said: "If the subject of the controversy were a foreign bill of

exchange, it might present an entirely different aspect."

One of the earliest cases in *Pennsylvania* upon the question is *The Mechanics' Bank of Philadelphia v. Earp* (1834), 4 Rawle (Pa.) 384; here the defendant drew upon parties in Virginia, and presented the bills to the bank to be transmitted for collection. The bills were not paid, and the bank refused to permit defendant to transfer his stock. In delivering the opinion of the Court, Justice ROGERS points out the distinction between the case of paper received for transmission for collection, and simply for collection: "If the undertaking of the bank was to *collect*, and not merely to *transmit*, they would be answerable for their Virginia correspondent; and this I understand to be the principle of the case of *Van Wail v. Woolley*, [*supra*] * * If the jury should be of opinion, that the Mechanics Bank undertook to *collect* the money, then it will be necessary to inquire, whether the bank of Virginia has done its duty, and what is the extent of the liability of the defendants. * * The bank would be liable in damages only as any other agent to his principal, to the extent of the damage which may have been sustained by their neglect." The next case which occupied the attention of the Court in that State, was that of a home bill or note: *Bellemire v. The Bank of the United States* (1838), 4 Whar. (Pa.) 105, wherein Chief Justice GIBSON expressed the rule as follows: "It has been ruled by this Court * * that a bank employed to transmit for collection, is bound to concern itself with the act of transmission alone; and that its correspondent becomes the agent for subsequent measures. It

is suggested, however, that a bank which has undertaken the whole business of collection, may be affected by other considerations ; but though it be the holder by endorsement, there is nothing peculiar in its position. It is invested with the apparent ownership only to authorize it to present for payment ; and standing in all other respects on the ordinary footing of an agent, it is sufficient to exonerate it that it has acted in good faith, and, though not to the best advantage, according to the regular and accustomed course of the business. * * A bank is compelled by the incorporeal nature of its essence, to act by the instrumentality of agents ; and when it employs its own servant with the usual instructions, it performs its implied promise to use ordinary diligence. * * It performed its undertaking when, for the purposes of presentation and notice, it put it into the hands of its own notary." In this case the Chief Justice took the view that the bank acted gratuitously, and according to the usual practice, and that there was no recourse. This was followed by the case of *Wingate v. Mechanics' Bank* (1848), 10 Pa. 105, in which the action was for damages for undertaking to collect a foreign bill for a valuable consideration. In this case, it appeared that the bank had put up in its premises placards, and also distributed them to its customers, offering to collect drafts on certain points for seven per cent. The notes were not collected and no notice was given. Justice COULTER in delivering the opinion of the Court dwells upon the difference between a draft handed to a bank for collection and one handed to it for transmission for collection : " Was the contract to col-

lect the notes by the defendants for seven per cent., established ; and if so, were they guilty of such negligence, under that contract, as to make them liable to the plaintiffs for the loss incurred in consequence of it ? * * The law is clear, that if an agent undertake to do a specified thing for a stipulated reward, he is bound to exercise due diligence to accomplish what he has agreed to do ; and to observe good faith towards his principal in every step, either of success or failure, towards accomplishing the end. The law implies a promise from brokers, bankers, or agents, and attorneys, that they will severally, in their respective callings, exercise competent skill and proper care in the service they undertake to perform ; in which if they fail, an action lies to recover damages for the breach of their implied promise. * * If the contract or agreement by defendants was not to collect the notes deposited, but merely an engagement to transmit them to a responsible person, * * the defendants were not liable, because they had committed them to a bank in good credit." With regard to the question of the obligation to give notice he referred to Story on Agency, § 208, where it is laid down that, " it is the duty of agents to keep their principals advised of their doings, and to give them notice in a reasonable time of all such facts and circumstances as may be important to their interests," and continuing, observed : " In the exercise of good faith to his principal, the agent ought to be held to the giving such notice, whether the agent be an individual or a bank ; for banks are subject to the settled law of contracts, as well as individuals."

The still more recent case of *Merchants' National Bank of Philadelphia v. Goodman* (1885), 109 Pa. 422, shows that, "The agreement to transmit for collection is a contract between the bank and its customer; the valuable consideration which supports the agreement as a contract, is the use of the money to be collected by the bank so long as it shall be allowed to remain in their hands after it has been collected. This binds the collecting bank to do all that is incumbent on them to do; and that entire duty, * * is discharged when the check or draft is transmitted to a responsible sub-agent to collect the money. The agent to whom the instrument is sent to make demand for payment, then becomes the agent of the depositor or endorser, and is liable to such depositor for loss arising from failure on his part to perform the duty which is incident to an undertaking to collect the money; and such duty is not discharged when anything but money is accepted as payment, in the absence of special authority to the contrary." This was the opinion of the Court below and was affirmed as above, Chief Justice MERCUR dissenting. The case of *Lee v. The First National Bank of West Chester* (1880), 1 Chest. Cnty. Rep. (Pa.) 109, is to the same effect.

In *Tennessee*, the case of *Bank of Louisville v. First National Bank of Knoxville* (1874), 8 Bax. (Tenn.) 101, supports the ruling in favor of the exemption of the bank from liability. The action was brought against the bank and Brown, a notary public, to recover damages for their failure to protest a bill of exchange sent by plaintiff to defendant. Here the Court said: "All that is required is, that the bank re-

ceiving such bill in the first place, should act in good faith in the selection of a proper agent to protect the interests of the holder of the bill." The Circuit Court, in accordance with the New York case of *Allen v. The Merchants' Bank*, *supra*, had held the bank liable, and was reversed.

The *Wisconsin* courts also follow this doctrine, in the case of a note payable by a party residing at a distance from the bank's place of business, that the contract is not absolutely to make due presentment and give due notice, but to place the note in the hands of some competent and responsible agent doing business at the residence of the maker, and that having done this, it is itself discharged from liability. The case of *Slacy and another v. The Dane County Bank* (1860), 12 Wis. 629, shows that in such cases "there is an implied authority to employ a sub-agent, and that if the bank exercises reasonable care and skill in selecting one, it is not afterwards liable for his default." This case supports a theory that if the note was in due season delivered to a notary public at the residence of the maker, for presentment and protest, such fact would constitute a good defense upon the ground "that those officers are appointed by public authority, and that therefore, at least in the absence of any direct notice to the contrary, parties have a right to assume that they are fit and proper agents to discharge the duties of their office."

In some cases, the bank actually making the collection, has been held to assume the entire agency, and to relieve the principal from liability, thus in *The Bank of Washington v. Triplett & Neale* (1828), 1 Peter (26 U. S.) 25, the bank contended

that it was not the agent of the plaintiffs, but of the Alexandria Bank, from whom it received the bill, and that where an agent, employed to transact a particular business, engages another person to do it, the latter is not responsible to the principal. This was denied by the Court, as the bill was not delivered to the Alexandria Bank for collection, but for transmission, and the Alexandria Bank by transmitting as directed performed its duty, and the whole responsibility of collection devolved on the defendant bank. Chief Justice MARSHALL, who delivered the opinion, said:—"the deposit of a bill in one bank to be transmitted for collection to another is a common usage of great public convenience, the effect of which is well understood. * * The letter of [the Alexandria Bank] disclosed the real party entitled to the money, and the answer to that letter assumes the agency, if it had not been previously assumed. The Court is decidedly of opinion that the Bank of Washington, by receiving the bill for collection, and certainly, by its letter, * * became the agent of Triplett and Neale, and assumed the responsibility attached to that character."

It is submitted that the liability of a bank which has undertaken to collect commercial paper, either domestic or foreign, cannot differ from that of any other party who has contracted to do a specified thing; for the law is well settled that if a person promises or undertakes to perform a certain act, he is liable for all defaults and negli-

gences, even though his action be gratuitous: *Coggs v. Bernard* (1704), 2 Ld. Raym. 909; therefore, if the paper has been placed in the hands of the bank for collection, in the absence of any express contract to the contrary, it is properly made liable for the acts of its agents and correspondents. There is in such case an implied contract co-ordinate and commensurate with duty, dictated by reason and justice; for, whenever it is certain that a man ought to do a particular thing, the law supposes him to have promised to do that thing: *Illinois Central RR. Co. v. U. S.* (1880), 16 Ct. Cl. 333.

Upon this theory, which it is contended is the true one, the whole question ought properly to be made to hinge upon the contract or undertaking of the bank. Was the paper placed in its hands for collection or merely for transmission for collection? If for the former purpose, then it is liable, but if for the latter, then its liability properly ceases upon its handing the same to a responsible and well selected person to transact the business required, as has been decided by the Courts in England, and by those of Indiana, Michigan, New Jersey, New York, Ohio, and South Carolina, and by the Court in Minnesota, as shown by the principal case, and supported by the decisions of the Supreme Court of the United States as already pointed out in this annotation.

ERNEST WATTS.

Philadelphia.

*Supreme Court of the United States.***CUNNINGHAM, SHERIFF v. NEAGLE.**

Upon an appeal to the Supreme Court from the action a circuit court upon a writ of *habeas corpus*, the Supreme Court must examine the evidence taken in the circuit court, to sustain or defeat the right of the petitioner to his discharge.

A deputy United States Marshal who kills a person assaulting a Circuit Judge while traveling his Circuit, is entitled to a writ of *habeas corpus*, when arrested by the State officials under a charge of murder.

Any duty of a deputy United States Marshal, which is fairly inferable from his office, when legally performed, is an act done in pursuance of a law of the United States, and entitles him to release from arrest by State authorities, performance charging the act to be a crime.

A deputy United States Marshal charged with the execution of the laws of the United States, has the powers of a peace officer and may use force in the performance of his duty.

United States Marshals are ministerial officers, and part of the executive department of the government, with duties beyond those specially prescribed by Acts of Congress, and arising from the Constitution itself.

The President has authority derived from his office, to protect the Judges of the United States Courts in the discharge of their duty, without calling upon State officials: and when he uses the civil power, the Department of Justice is the proper one to direct the means of protection.

Appeal from the United States Circuit Court for the Northern District of California. The facts are stated in the opinion.

Hon. *G. A. Johnson*, Attorney General of California, *S. Shellabarger*, *J. M. Wilson* and *Z. Montgomery* for the appellant.

Hon. *W. H. H. Miller*, Attorney General of the United States, *Joseph H. Choate* and *James C. Carter*, for the appellee.

MILLER, J., April 14, 1890. This is an appeal by Cunningham, Sheriff of the County of San Joaquin, in the State of California, from a judgment of the Circuit Court of the United States for the Northern District of California, discharging David Neagle from the custody of said Sheriff, who held him a prisoner on a charge of murder. On the 16th day of August, 1889, there was presented to Judge SAWYER, the Circuit Judge of the United States for the Ninth Circuit,

embracing the Northern District of California, a petition signed, "DAVID NEAGLE, Deputy United States Marshal," by A. L. Farish on his behalf. This petition represented that the said Farish was a deputy-marshal duly appointed for the Northern District of California by J. C. Franks, who was the Marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition, and at the time of filing it, a duly-appointed and acting Deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined, and restrained of his liberty in the county jail in San Joaquin County, in the State of California, by Thomas Cunningham, Sheriff of said County, upon a charge of murder, under a warrant of arrest, a copy of which was annexed to the petition. The warrant was as follows:

In the Justice's Court of Stockton Township.

STATE OF CALIFORNIA }
COUNTY OF SAN JOAQUIN } s.s.

The people of the State of California to any sheriff, constable, marshal, or policeman of said State, or of the County of San Joaquin:

Information on oath having been this day laid before me by Sarah A. Terry that the crime of murder, a felony, has been committed within said County of San Joaquin on the 14th day of August, A. D. 1889, in this, that one David S. Terry, a human being then and there being, was wilfully, unlawfully, feloniously, and with malice aforethought, shot, killed, and murdered, and accusing Stephen J. Field and David Neagle thereof, you are therefore commanded forthwith to arrest the above-named Stephen J. Field and David Neagle, and bring them before me, at my office in the city of Stockton, or, in case of my absence or inability to act, before the nearest and most accessible magistrate in the County.

Dated at Stockton, this 14th day of August, A. D. 1889.

H. V. J. SWAIN, *Justice of the Peace.*

The defendant, David Neagle, having been brought before me on this warrant, is committed for examination to the sheriff of San Joaquin county, California. Dated August 15, 1889.

H. V. J. SWAIN, *Justice of the Peace.*

The petition then recites the circumstances of a rencounter between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter, and of what led to it, will be considered with more

particularity hereafter. The main allegation of this petition is that Neagle, as United States Deputy-Marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney General of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable STEPHEN J. FIELD, a Justice of the Supreme Court of the United States, been in attendance upon said Justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge FIELD, and in defense of the life of the Judge, the homicide was committed for which Neagle was held by Cunningham. The allegation is very distinct that Justice FIELD was engaged in the discharge of his duties as Circuit Justice of the United States for that Circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the circuit court at that place. The allegation is also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It is also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham is in violation of the laws and Constitution of the United States, and that he is in custody for an act done in pursuance of the laws of the United States. This petition being sworn to by Farish and presented to Judge SAWYER, he made the following order:

Let a writ of *habeas corpus* issue in pursuance of the prayer of the within petition, returnable before United States Circuit Court for the Northern District of California.

SAWYER, *Circuit Judge.*

The writ was accordingly issued and delivered to Cunningham, who made the following return:

COUNTY OF SAN JOAQUIN, }
STATE OF CALIFORNIA, } *Sheriff's Office.*

To the honorable Circuit Court of the United States for the Northern District of California :

I hereby certify and return that before the coming to me of the annexed writ of *habeas corpus* the said David Neagle was committed to my custody, and is detained by me by virtue of a warrant issued out of the Justice's Court of Stockton Township, State of California, County of San Joaquin, and by the indorsement made upon said warrant. Copy of said warrant and indorsement is annexed hereto, and made a part of this return.

Nevertheless, I have the body of the said David Neagle before the honorable court, as I am in the said writ commanded. August 17, 1889.

THOMAS CUNNINGHAM, *Sheriff*,
San Joaquin County, California.

Various pleadings and amended pleadings were made, which do not tend much to the elucidation of the matter before us. Cunningham filed a demurrer to the petition for the writ of *habeas corpus*; and Neagle filed a traverse to the return of the Sheriff, which was accompanied by exhibits, the substance of which will be hereafter considered, when the case comes to be examined upon its facts.

The hearing in the Circuit Court was had before Circuit Judge SAWYER and District Judge SABIN. The Sheriff, Cunningham, was represented by *G. A. Johnson*, Attorney General of the State of California; and other counsel. A large body of testimony, documentary and otherwise, was submitted to the Court, on which, after a full consideration of the subject, the Court made the following order :

In the matter of DAVID NEAGLE. On *Habeas Corpus*.

In the above-entitled matter, the Court, having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the Court that the allegations of the petitioner in his amended answer or traverse to the return of the Sheriff of San Joaquin County, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States, it is therefore ordered that petitioner be, and he is hereby, discharged from custody.

From that order, an appeal was allowed, which brings the case to this Court, accompanied by a voluminous record of

all the matters which were before the Court on the hearing. (See 28 AMERICAN LAW REGISTER, 585).

If it be true, as stated in this order of the Court discharging the prisoner, that he was held "in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States," there does not seem to be any doubt that, under the statute on that subject, he was properly discharged by the Circuit Court.

Section 753 of the Revised Statutes reads as follows:

The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

Rev. Stat. U. S. §§ 751, 752, give power to the Supreme Court, the Circuit and District Courts, and the several Justices and Judges of said Courts to issue writs of *habeas corpus*.

And section 761 declares that when, by the writ of *habeas corpus* the petitioner is brought up for a hearing, the "court or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." This, of course, means that if he is held in custody in violation of the Constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged.

By the law, as it existed at the time of the enactment of the Revised Statutes, an appeal could be taken to the circuit court from any court of justice or judge inferior to the circuit court in a certain class of *habeas corpus* cases. But

there was no appeal to the Supreme Court in any case, except where the prisoner was the subject or citizen of a foreign State, and was committed or confined under the authority or law of the United States, or of any State, on account of any act done or omitted to be done under the commission or authority of a foreign State, the validity of which depended upon the law of nations. But afterwards, by the act of Congress of March 3, 1885 (23 Stat. at Large, 437), this was extended by amendment as follows:

That section seven hundred and sixty-four of the Revised Statutes be amended so that the same shall read as follows: From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the preceding section.

The preceding section here referred to is section 763, and is the one on which the prisoner relies for his discharge from custody in this case.

Section 763 provides, among other cases, for the issuing of writs of *habeas corpus* by the circuit courts on petition of persons alleged to be restrained of their liberty in violation of the Constitution or laws of the United States.

It will be observed that in both the provisions of the Revised Statutes and of this latter act of Congress, the mode of review, whether by the circuit court of the judgment of an inferior court or justice or judge, or by this Court, of the judgment of a circuit court, the word "appeal," and not "writ of error," is used; and, as Congress has always used these words with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review, as in actions at common law, while by an appeal, except when specially provided otherwise, the entire case, on both law and facts, is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge.

The history of the incidents which led to the tragic event of the killing of Terry by the prisoner, Neagle, had its origin

in a suit brought by William Sharon, of Nevada, in the Circuit Court of the United States for the District of California, against Sarah Althea Hill, alleged to be a citizen of California, for the purpose of obtaining a decree adjudging a certain instrument in writing possessed and exhibited by her, purporting to be a declaration of marriage between them under the Code of California, to be a forgery, and to have it set aside and annulled. This suit, which was commenced October 3, 1883, was finally heard before Judge SAWYER, the Circuit Judge for that Circuit and Judge DEADY, United States District Judge for Oregon, who had been duly appointed to assist in holding the Circuit Court for the District of California. The hearing was on September 29, 1885, and on the 15th of January, 1886, a decree was rendered, granting the prayer of the bill. In that decree, it was declared that the instrument purporting to be a declaration of marriage, set out and described in the bill of complaint, "was not signed or executed at any time by William Sharon, the complainant; that it is not genuine; that it is false, counterfeited, fabricated, forged, and fraudulent, and, as such, is utterly null and void. And it is further ordered and decreed that the respondent, Sarah Althea Hill, deliver up and deposit with the clerk of the court said instrument, to be indorsed 'Canceled,' and that the clerk write across it, 'Canceled,' and sign his name and affix his seal thereto." The rendition of this decree was accompanied by two opinions; the principal one being written by Judge DEADY, and a concurring one by Judge SAWYER. They were very full in their statement of the fraud and forgery practiced by Miss Hill, and stated that it was also accompanied by perjury, and, inasmuch as Mr. Sharon had died between the hearing of the argument of the case, on the 29th of September, 1885, and the time of rendering this decision, January 15, 1886, an order was made setting forth that fact, and declaring that the decree was entered as of the date of the hearing, *nunc pro tunc*.

Nothing was done under this decree. The defendant, Sarah Althea Hill, did not deliver up the instrument to the

clerk to be canceled, but she continued to insist upon its use in the State court. Under these circumstances, Frederick W. Sharon, as the executor of the will of his father, William Sharon, filed in the Circuit Court for the Northern District of California, on March 12, 1888, a bill of revivor, stating the circumstances of the decree, the death of his father, and that the decree had not been performed; alleging, also, the inter-marriage of Miss Hill with David S. Terry, of the City of Stockton, in California, and making the said Terry and wife parties to this bill of revivor. The defendants both demurred and answered, resisting the prayer of the plaintiff, and denying that the petitioner was entitled to any relief. This case was argued in the Circuit Court before FIELD, Circuit Justice, SAWYER, Circuit Judge, and SABIN, District Judge. While the matter was held under advisement, Judge SAWYER, on returning from Los Angeles, in the Southern District of California, where he had been holding court, found himself on the train as it left Fresno, which is understood to have been the residence of Terry and wife, in a car in which he noticed that Mr. and Mrs. Terry were in a section behind him, on the same side. On this trip from Fresno to San Francisco, Mrs. Terry grossly insulted Judge SAWYER, and had her husband change seats so as to sit directly in front of the Judge, while she passed him with insolent remarks, and pulled his hair with a vicious jerk, and then, in an excited manner, taking a seat by her husband's side, said:—

I will give him a taste of what he will get by and by. Let him render this decision if he dares.

The decision being the one already mentioned, then under advisement. Terry then made some remark about too many witnesses being in the car, adding that—

The best thing to do with him would be to take him out into the bay and drown him.

These incidents were witnessed by two gentlemen who knew all the parties, and whose testimony is found in the record before us. This was August 14, 1888. On the 3d

of September the Court rendered its decision, granting the prayer of the bill of revivor in the name of Frederick W. Sharon and against Sarah Althea Terry and her husband, David S. Terry. The opinion was delivered by Mr. Justice FIELD, and during its delivery a scene of great violence occurred in the court-room. It appears that shortly before the Court opened on that day, both the defendants in the case came into the court-room and took seats within the bar at the table next the clerk's desk, and almost immediately in front of the judges. Besides Mr. Justice FIELD, there were present on the bench Judge SAWYER and Judge SABIN, of the District Court of the United States for the District of Nevada.

The defendants had denied the jurisdiction of the Court originally to render the decree sought to be revived, and the opinion of the Court necessarily discussed this question, without reaching the merits of the controversy. When allusion was made to this question, Mrs. Terry arose from her seat, and, addressing the Justice who was delivering the opinion, asked, in an excited manner, whether he was going to order her to give up the marriage contract to be canceled. Mr. Justice FIELD said :—

Be seated, madam.

She repeated the question, and was again told to be seated. She then said, in a very excited and violent manner, that Justice FIELD had been bought, and wanted to know the price he had sold himself for ; that he had got Newland's money for it, and everybody knew that he had got it, or words to that effect. Mr. Justice FIELD then directed the Marshal to remove her from the court-room. She asserted that she would not go from the room, and that no one could take her from it. Marshal Franks proceeded to carry out the order of the Court by attempting to compel her to leave, when Terry, her husband, arose from his seat under great excitement, exclaiming that no man living should touch his wife, and struck the Marshal a blow in his face so violent as to knock out a tooth. He then unbuttoned his coat, thrust his hand under his vest, apparently for the purpose of drawing a

bowie-knife, when he was seized by persons present, and forced down on his back. In the meantime Mrs. Terry was removed from the court-room by the Marshal, and Terry was allowed to rise, and was accompanied by officers to the door leading to the Marshal's office. As he was about leaving the room, or immediately after being out of it, he succeeded in drawing a bowie-knife, when his arms were seized by a deputy marshal, and others present, to prevent him from using it; and they were able to wrench it from him only after a severe struggle. The most prominent person engaged in wresting the knife from Terry was Neagle, the prisoner now in Court. For this conduct both Terry and his wife were sentenced by the Court to imprisonment for contempt,—Mrs. Terry for one month and Terry for six months; and these sentences were immediately carried into effect. Both the judgment of the Court on the petition for the revival of the decree in the case of *Sharon against Hill*, and the judgment of the Circuit Court, imprisoning Terry and wife for contempt, have been brought to this Court for review; and, in both cases, the judgments have been affirmed. The report of the cases may be found in *Ex parte Terry* (1888), 128 U. S. 289, and *Terry v. Sharon* (1889), 131 U. S. 40.

Terry and Mrs. Terry were separately indicted by the grand jury of the Circuit Court of the United States, during the same term, for their part in these transactions; and the cases were pending in said Court at the time of Terry's death. It also appears that Mrs. Terry, during her part of this altercation in the court-room, was making efforts to open a small satchel which she had with her, but through her excitement she failed. This satchel, which was taken from her, was found to have in it a revolving pistol.

From that time until his death, the denunciations by Terry and his wife of Mr. Justice FIELD were open, frequent, and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill both Judge FIELD and Judge SAWYER.

Terry, who was present, said nothing to restrain her, but added that he was not through with Judge FIELD yet; and, while in jail at Alameda, Terry said that after he got out of jail, he would horsewhip Judge FIELD, and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge FIELD and horsewhipping him; and, in reply to a remark that this would be a dangerous thing to do, and that Judge FIELD would resent it, he said :—

If Judge FIELD resents it, I will kill him.

And while in jail Mrs. Terry exhibited to a witness Terry's knife, at which he laughed, and said :—

Yes, I always carry that.

And made a remark about judges and marshals, that they were all a lot of cowardly curs, and he would see some of them in their graves yet. Mrs. Terry also said that she expected to kill Judge FIELD some day. Perhaps the clearest expression of Terry's feelings and intentions in the matter was in a conversation with Mr. Thomas T. Williams, editor of one of the daily newspapers in California. This interview was brought about by a message from Terry requesting Williams to call and see him. In speaking of the occurrences in the Court, he said that Justice FIELD had put a lie in the record about him, and when he met FIELD, he would have to take that back. And if he did not take it back, and apologize for having lied about him, he would slap his face or pull his nose.

I said to him, said the witness, Judge Terry, would not that be a dangerous thing to do? Justice FIELD is not a man who would permit anyone to put a deadly insult upon him, like that.

He said, Oh, FIELD won't fight.

I said: Well Judge, I have found nearly all men will fight. Nearly every man will fight when there is occasion for it, and Judge FIELD has had a character in this State of having the courage of his convictions, and being a brave man.

At the conclusion of that branch of the conversation, I said to him: Well, Judge FIELD is not your physical equal, and if any trouble should occur he would be very likely to use a weapon.

He said: Well, that's as good a thing as I want to get.

The whole impression conveyed to me by this conversation was that he felt he had some cause of grievance against Judge FIELD; that he hoped they might meet, that he might have an opportunity to force a quarrel upon him, and he would get him into a fight.

Mr. Williams says that after the return of Justice FIELD to California, in the spring or summer of 1889, he had other conversations with Terry, in which the same vindictive feelings of hatred were manifested and expressed by him. It is useless to go over the testimony on this subject more particularly. It is sufficient to say that the evidence is abundant that both Terry and wife contemplated some attack upon Judge FIELD during his official visit to California in the summer of 1889, which they intended should result in his death. Many of these matters were published in the newspapers, and the press of California was filled with the conjectures of a probable attack by Terry on Justice FIELD, as soon as it became known that he was going to attend the Circuit Court in that year.

So much impressed were the friends of Judge FIELD, and of public justice, both in California and in Washington, with the fear that he would fall a sacrifice to the resentment of Terry and his wife, that application was made to the Attorney General of the United States, suggesting the propriety of his furnishing some protection to the Judge while in California. This resulted in a correspondence between the Attorney General of the United States, the District Attorney, and the Marshal of the Northern District of California on that subject. This correspondence is here set out:

JOHN C. FRANKS, Department of Justice,
United States Marshal, WASHINGTON, D. C., April 27th, 1889.
 San Francisco, Cal.

Sir :

The proceedings which have heretofore been had in connection with the case of Mr. and Mrs. Terry in your United States Circuit Court have become matter of public notoriety, and I deem it my duty to call your attention to the propriety of exercising unusual caution, in case further proceedings shall be had in that case, for the protection of his honor, Justice FIELD, or whoever may be called upon to hear and determine the matter. Of course, I do not know what may be the feelings or purpose of

Mr. and Mrs. Terry in the premises, but many things which have happened indicate that violence on their part is not impossible. It is due to the dignity and independence of the Court, and the character of its Judge, that no effort on the part of the government shall be spared to make them feel entirely safe and free from anxiety in the discharge of their high duties. You will understand, of course, that this letter is not for the public, but to put you upon your guard. It will be proper for you to show it to the District Attorney if deemed best.

Yours truly,

W. H. H. MILLER, *Attorney General.*

United States Marshal's Office, Northern District of California,

HON. W. H. H. MILLER,

SAN FRANCISCO, May 6, 1889.

Attorney General,

Sir: Washington, D. C.

Yours of the 27th ultimo at hand. When the Hon. Judge LORENZO SAWYER, our Circuit Judge, returned from Los Angeles, some time before the celebrated court scene, and informed me of the disgraceful action of Mrs. Terry towards him on the cars while her husband sat in front, smilingly approving it, I resolved to watch the Terrys (and so notified my deputies), whenever they should enter the court-room, to be ready to suppress the very first indignity offered by either of them to the judges. After this, at the time of their ejection from the court-room, when I held Judge Terry and his wife as prisoners in my private office, and heard his threats against Justice FIELD, I was more fully determined than ever to throw around the Justice and Judge SAWYER, every safeguard I could. I have given the matter careful consideration, with the determination to fully protect the federal judges at this time, trusting that the department will reimburse me for any reasonable expenditure. I have always, whenever there is any likelihood of either Judge or Mrs. Terry appearing in court, had a force of deputies with myself on hand to watch their every action. You can rest assured that when Justice FIELD arrives he, as well as all the federal judges, will be protected from insults, and where an order is made, it will be executed without fear as to consequences. I shall follow your instructions, and act with more than usual caution. I have already consulted with the United States Attorney, J. T. Carey, Esq., as to the advisability of making application to you, at the time the Terrys are tried upon criminal charges, for me to select two or more detectives to assist in the case, and also assist me in protecting Justice FIELD while in my district. I wish the judges to feel secure, and for this purpose will see to it that their every wish is promptly obeyed. I notice your remarks in regard to the publicity of your letter, and will obey your request. I shall only be too happy to receive any suggestions from you at any time. The opinion among the better class of citizens here is very bitter against the Terrys, though, of course, they have their friends, and, unfortunately, among that class it is necessary to watch.

Your most obedient servant,

J. C. FRANKS,

U. S. Marshal, Northern Dist. of Cal.

HON. W. H. H. MILLER, SAN FRANCISCO, CAL., May 7, 1889.
U. S. Attorney General,
Washington, D. C.

Dear Sir :

Marshal Franks exhibited to me your letter bearing date the 27th ult., addressed to him upon the subject of using due caution by way of protecting Justice FIELD and the federal judges here in the discharge of their duties in matters in which the Terrys are interested. I noted your suggestion with a great degree of pleasure, not because our Marshal is at all disposed to leave anything undone within his authority or power to do, but because it encouraged him to know and feel that the head of our Department was in full sympathy with the efforts being made to protect the judges, and vindicate the dignity of our courts. I write merely to suggest that there is just reason, in the light of the past and the threats made by Judge and Mrs. Terry against Justice FIELD and Judge SAWYER, to apprehend personal violence at any moment and at any place, as well in court as out of court, and that, while due caution has always been taken by the Marshal when either Judge or Mrs Terry is about the building in which the courts are held, he has not felt it within his authority to guard either Judge SAWYER or Justice FIELD against harm when away from the appraisers' building. Discretion dictates, however, that a protection should be thrown about them at other times and places, when proceedings are being had before them in which the Terrys are interested ; and I verily believe, in view of the direful threats made against Justice FIELD, that he will be in great danger at all times while here. Mr. Franks is a prudent, cool, and courageous officer, who will not abuse any authority granted him. I would therefore suggest that he be authorized, in his discretion, to retain one or more deputies, at such times as he may deem necessary, for the purposes suggested. That publicity may not be given to the matter, it is important that the deputies whom he may select be not known as such ; and, that efficient service may be assured for the purposes indicated, it seems to me that they should be strangers to the Terrys. The Terrys are unable to appreciate that an officer should perform his official duty when that duty in any way requires his efforts to be directed against them. The Marshal, his deputies, and myself suffer daily indignities and insults from Mrs. Terry, in court and out of court, committed in the presence of her husband, and without interference upon his part. I do not propose being deterred from any duty, nor do I purpose being intimidated in the least degree from doing my whole duty in the premises ; but I shall feel doubly assured in being able to do so knowing that our Marshal has your kind wishes and encouragement in doing everything needed to protect the officers of the court in the discharge of their duties. This, of course, is not intended for the public files of your office, nor will it be on file in my office. Prudence dictates great caution on the part of the officials who may be called upon to have anything to do in the premises, and I deem it to be of the greatest importance that the suggestions back and forth be confidential. I shall write you further upon the subject of these cases in a few days. I have the honor to be your most obedient servant.

JOHN T. CAREY, *U. S. Attorney.*

J. C. FRANKS, Esq.,
U. S. Marshal,
San Francisco, Cal.

Department of Justice,
WASHINGTON, D. C., May 27, 1889.

Sir:

Referring to former correspondence of the Department, relating to a possible disorder in the session of the approaching term of court, owing to the small number of bailiffs under your control to preserve order, you are directed to employ certain special deputies at a *per diem* of five dollars, payable out of the appropriation for fees and expenses of marshals, to be submitted to the court, as a separate account from your other accounts against the government, for approval, under section 846, Revised Statutes, as an extraordinary expense, that the same may be forwarded to this Department in order to secure executive action and approval.

Very respectfully,

W. H. H. MILLER, *Attorney General*.

The result of this correspondence was that Marshal Franks appointed Mr. Neagle a Deputy-Marshal for the Northern District of California, and gave him special instructions to attend upon Judge FIELD, both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by Terry and wife. Accordingly, when Judge FIELD went from San Francisco to Los Angeles, to hold the Circuit Court of the United States at that place, Mr. Neagle accompanied him, remained with him for the few days that he was engaged in the business of that Court, and returned with him to San Francisco. It appears from the uncontradicted evidence in the case that, while the sleeping-car in which were Justice FIELD and Mr. Neagle stopped a moment, in the early morning, at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace-officers could be found at Lathrop, where the train stopped for breakfast; and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace-officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Judge FIELD. It is sufficient to say that this resulted in no available aid to assist in keeping the peace. When the train arrived, Neagle informed Judge FIELD of the presence of Terry on the train, and advised him to remain, and take his break-

fast in the car. This the Judge refused to do, and he and Neagle got out of the car, and went into the dining-room, and took seats beside each other in the place assigned them by the person in charge of the breakfast-room; and very shortly after this Terry and wife came into the room, and Mrs. Terry, recognizing Judge FIELD, turned and left in great haste, while Terry passed beyond where Judge FIELD and Neagle were, and took his seat at another table. It was afterwards ascertained that Mrs. Terry went to the car, and took from it a satchel in which was a revolver. Before she returned to the eating-room, Terry arose from his seat, and, passing around the table in such a way as brought him behind Judge FIELD, who did not see him or notice him, came up where he was sitting with his feet under the table, and struck him a blow on the side of his face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow, when Neagle, who had been observing him all this time, arose from his seat with his revolver in his hand, and in a very loud voice shouted out:

Stop! Stop! I am an officer!

Upon this, Terry turned his attention to Neagle, and, as Neagle testifies, seemed to recognize him, and immediately turned his hand to thrust it in his bosom, as Neagle felt sure, with the purpose of drawing a bowie-knife. At this instant Neagle fired two shots from his revolver into the body of Terry, who immediately sank down, and died in a few minutes. Mrs. Terry entered the room, with the satchel in her hand, just after Terry sank to the floor. She rushed up to the place where he was, threw herself upon his body, made loud exclamations and moans, and commenced inviting the spectators to avenge her wrong upon FIELD and Neagle. She appeared to be carried away by passion, and in a very earnest manner charged that FIELD and Neagle had murdered her husband intentionally; and shortly afterwards she appealed to the persons present to examine the body of Terry to see that he had no weapons. This she did once or twice.

The satchel which she had, being taken from her, was found to contain a revolver.

These are the material circumstances produced in evidence before the circuit court on the hearing of this *habeas corpus* case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice FIELD; and we are quite sure that if Neagle had been merely a brother or a friend of Judge FIELD, traveling with him, and aware of all the previous relations of Terry to the Judge,—as he was,—of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defense of Mr. Justice FIELD'S life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California; and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the State authorities for this offense, unless there be found in aid of the defense of the prisoner, some element of power and authority asserted under the government of the United States. This element is said to be found in the facts that Mr. Justice FIELD, when attacked, was in the immediate discharge of his duty as Judge of the Circuit Courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty as Circuit Justice in the case, for which they were committed for contempt of court; and that the Deputy-Marshall of the United States who killed Terry in defense of FIELD'S life, was charged with a duty, under the law of the United States, to protect FIELD from the violence which Terry was inflicting, and which was intended to lead to FIELD'S death. To the

inquiry whether this proposition is sustained by law and the facts which we have recited, we now address ourselves.

Mr. Justice FIELD was a member of the Supreme Court of the United States, and had been a member of that Court for over a quarter of a century, during which he had become venerable for his age and for his long and valuable service in that Court. The business of the Supreme Court has become so exacting that, for many years past, the Justices of it have been compelled to remain for the larger part of the year in Washington City, from whatever part of the country they may have been appointed. The term for each year, including the necessary travel and preparations to attend at its beginning, has generally lasted from eight to nine months. But the Justices of this Court have imposed upon them other duties, the most important of which arise out of the fact that they are also Judges of the Circuit Courts of the United States. Of these circuits there are nine, to each one of which a Justice of the Supreme Court is allotted, under section 606 of the Revised Statutes, the provision of which is as follows—

The Chief Justice and Associate Justices of the Supreme Court shall be allotted among the circuits by an order of the Court; and a new allotment shall be made whenever it becomes necessary or convenient, by reason of the alteration of any circuit, or of the new appointment of a Chief Justice or Associate Justice, or otherwise."

Section 610 declares that it "shall be the duty of the Chief Justice and of each Justice of the Supreme Court to attend at least one term of the Circuit Court in each district of the circuit to which he is allotted during every period of two years." Although this enactment does not require, in terms, that the Justices shall go to their circuits more than once in two years, the effect of it is to compel most of them to do this, because there are so many districts in many of the circuits that it is impossible for the Circuit Justice to reach them all in one year; and the result of this is that he goes to some of them in one year, and to others in the next year, thus requiring an attendance in the circuit, every year. The Justices of the Supreme Court have been members of

the Circuit Courts of the United States ever since the organization of the government; and their attendance on the circuit, and appearance at the places where the courts are held, has always been thought to be a matter of importance.

In order to enable him to perform this duty, Mr. Justice FIELD had to travel each year from Washington City, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this, he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying causes. There are many duties which the judge performs outside of the court-room where he sits to pronounce judgment or to preside over a trial. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called "chambers." This chamber work is as important, as necessary, as much a discharge of his official duty, as that performed in the court-house. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be; and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court. So it is impossible for a Justice of the Supreme Court of the United States, who is compelled by the obligations of duty to be so much in Washington City, to discharge his duties of attendance on the Circuit Courts, as prescribed by section 610, without traveling, in the usual and most convenient modes of doing it, to the place where the court is to be held. This duty is as much an obligation imposed by the law as if it had said in words—

The Justices of the Supreme Court shall go from Washington City to the place where their terms are held every year.

Justice FIELD had not only left Washington, and traveled the three thousand miles or more which was necessary to reach his circuit, but he had entered upon the duties of that circuit, had held the court at San Francisco for some time,

and, taking a short leave of that court, had gone down to Los Angeles, another place where a court was to be held, and sat as a judge there for several days, hearing cases and rendering decisions. It was in the necessary act of returning from Los Angeles to San Francisco, by the usual mode of travel between the two places, where his court was still in session, and where he was required to be, that he was assaulted by Terry in the manner which we have already described.

The occurrence which we are called upon to consider was of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject. In the case of *U. S. v. The Little Charles* (1819), 1 Brock. 380, a question arose before Chief Justice MARSHALL, holding the Circuit Court of the United States for Virginia, as to the validity of an order made by the District Judge at his chambers, and not in court. The Act of Congress authorized stated terms of the District Court, and gave the judge power to hold special courts, at his discretion, either at the place appointed by the law, or such other place in the district as the nature of the business and his discretion should direct. He says: "It does not seem to be a violent construction of such an act to consider the judge as constituting a court whenever he proceeds on judicial business;" and cites the practice of the courts in support of that view of the subject. In the case of *U. S. v. Gleason* (1867), U.S. C. Ct., D. Iowa, 1 Woolw. 128, the prisoner was indicted for the murder of two enrolling officers who were charged with the duty of arresting deserters, or those who had been drafted into the service and had failed to attend. These men, it was said, had visited the region of country where they were murdered, and, having failed of accomplishing their purpose of arresting the deserters, were on their return to their home when they were killed; and the Court was asked to instruct the jury that under these circumstances they were not engaged in the duty of arresting the deserters named.

"It is claimed by the counsel for the defendant," says the report, "that

if the parties killed had been so engaged, and had come to that neighborhood with the purpose of arresting the supposed deserters, but at the moment of the assault had abandoned the intention of making the arrests at that time, and were returning to headquarters at Grinnell with a view to making other arrangements for arrest at another time, they were not so engaged as to bring the case within the law." But the Court held that this was not a sound construction of the statute, and "that if the parties killed had come into that neighborhood with intent to arrest the deserters named, and had been employed by the proper officer for that service, and were, in the further prosecution of that purpose, returning to Grinnell with a view to making other arrangements to discharge this duty, they were still employed in arresting deserters, within the meaning of the statute. It is not necessary," said the Court, "that the party killed should be engaged in the immediate act of arrest, but it is sufficient if he be employed in and about that business when assaulted. The purpose of the law is to protect the life of the person so employed, and this protection continues so long as he is engaged in a service necessary and proper to that employment."

We have no doubt that Mr. Justice FIELD, when attacked by Terry, was engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection, under those circumstances, which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge FIELD in the present case, and, indeed, no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of *habeas corpus* must, in this connection, show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy-marshals of the United States, in express terms, to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view

of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of *habeas corpus* to persons imprisoned for the performance of their duty; and we are satisfied that, if it was the duty of Neagle, under the circumstances,—a duty which could only arise under the laws of the United States,—to defend Mr. Justice FIELD from a murderous attack upon him, he brings himself within the meaning of the section we have recited.

This view of the subject is confirmed by the alternative provision that he must be in custody "for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or a judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States." In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is a "law," within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means than by the skill which is applied to the cure of disease after it has become fully developed. So, also, the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed. If a person in the situation of Judge

FIELD could have no other guaranty of his personal safety while engaged in the conscientious discharge of a disagreeable duty than the fact that, if he was murdered, his murderer would be subject to the laws of a State, and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind, of insulting him and assaulting him, and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies. We do not believe that the Government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the Government so defenseless and unprotected.

The views expressed by this Court through Mr. Justice BRADLEY, in *Ex parte Siebold* (1880), 100 U. S. 371, 394, are very pertinent to this subject, and express our views with great force. That was a case of a writ of *habeas corpus*, where Siebold had been indicted in the Circuit Court of the United States for the District of Maryland for an offense committed against the election laws during an election at which members of Congress and officers of the State of Maryland were elected. He was convicted and sentenced to fine and imprisonment, and filed his petition in this Court for a writ of *habeas corpus*, to be relieved on the ground that the court which had convicted him was without jurisdiction. The foundation of this allegation was that the Congress of the United States had no right to prescribe laws for the conduct of the election in question, or for enforcing the laws of the State of Maryland by the courts of the United States. In the course of the discussion of the relative powers of the federal and State courts on this subject, it is said :—

Somewhat akin to the argument which has been considered, is the objection that the deputy-marshals authorized by the act of Congress to be created, and to attend the elections, are authorized to keep the peace, and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confined to the government of the United States, but belongs exclusively to the States. Here, again, we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire

misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land." * * * Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified. Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the process of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old Confederation. * * * It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction.

At the same term of the court, in the case of *Tennessee v. Davis* (1880), 100 U. S. 257, 262, where the same questions in regard to the relative powers of the federal and State courts were concerned, in regard to criminal offenses, the Court expressed its views through Mr. Justice STRONG, quoting from the case of *Martin v. Hunter* (1816), 1 Wheat. (14 U. S.) 363, the following language:—

"The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers," and then proceeding: "It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court for an alleged offense against the law of the State,

yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government; and even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it.

To cite all the cases in which this principle of the supremacy of the government of the United States in the exercise of all the powers conferred upon it by the Constitution is maintained, would be an endless task. We have selected these as being the most forcible expressions of the views of the Court, having a direct reference to the nature of the case before us. Where, then, are we to look for the protection which we have shown Judge FIELD was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States, because, as has been more than once said in this Court, in the division of the powers of government between the three great departments, executive, legislative, and judicial, the judicial is the weakest for the purposes of self-protection, and for the enforcement of the powers which it exercises. The ministerial officers, through whom its commands must be executed, are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure.

They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the District attorneys of the United States who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress. If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, § 3, art. 2, declares that the President "shall take care that the laws be faithfully executed;" and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them, and to fill vacancies. He is declared to be the Commander in chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, who are familiarly called "cabinet ministers." These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called; and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed." Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms; or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war *St. Louis*, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul, subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hulsemann, the Austrian minister at Washington, which arose out of this affair, and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention; and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?

So, if the President or the postmaster general is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed, and the mail carriers assaulted and murdered, in any particular region of country, who can doubt the authority of the President, or of one of the executive departments under him, to make an order for the protection of the mail, and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice FIELD, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United

States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more, which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as "timber thieves," who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately, we find this question answered by this court in the case of *Wells v. Nickles* (1882), 104 U. S. 444.

That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States, and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government, thus to seize the timber cut by trespassers on its lands. The Court said:

The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful.

But the Court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land-office had, by instructions from the Sec-

retary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the Court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.

One of the cases in this court in which this question was presented in the most imposing form is that of *U. S. v. Tin Co.* (1888), 125 U. S. 273. In that case, a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the government by fraud and deceit practiced upon its officers. A preliminary question was raised by counsel for defendant, which was earnestly insisted upon, as to the right of the Attorney General, or any other officer of the government, to institute such a suit in the absence of any act of Congress authorizing it. It was conceded that there was no express authority given to the Attorney General to institute that particular suit, or any suit of that class. The question was one of very great interest, and was very ably argued both in the court below and in this Court. The response of this Court to that suggestion conceded that in the acts of Congress establishing the Department of Justice and defining the duties of the Attorney General there was no such express authority; and it was said that there was also no express authority to him to bring suits against debtors of the government upon bonds, or to begin criminal prosecutions, or to institute criminal proceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said:

If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its courts, for relief, by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself from frauds, impositions, and deceptions than the private individual, is hardly open to argu-

ment. * * * There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney General. How, then, can it be argued that if the United States has been deceived, entrapped, or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument thus fraudulently obtained without a special act of Congress in each case, or without some special authority applicable to this class of cases?

The same question was raised in the earlier case of *U. S. v. Hughes* (1850), 11 How. (52 U. S.) 552, and decided the same way.

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death; and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence, already recited in this opinion, between the Marshal of the Northern District of California and the Attorney General and the District Attorney of the United States for that District, although prescribing no very specific mode of affording this protection by the Attorney General, is sufficient, we think, to warrant the Marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defense of Mr. Justice FIELD.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter 14, title 13, of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 788 declares:

The marshals and their deputies shall have, in each State, the same

powers in executing the laws of the United States as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof.

If, therefore, a sheriff of the State of California, was authorized to do in regard to the laws of California what Neagle did—that is, if he was authorized to keep the peace, to protect a judge from assault and murder—then Neagle was authorized to do the same thing in reference to the laws of the United States. Section 4176 of the Political Code of California reads as follows:

The sheriff must (1) preserve the peace; (2) arrest and take before the nearest magistrate, for examination, all persons who attempt to commit, or have committed, a public offense; (3) prevent and suppress all affrays, breaches of the peace, riots, and insurrections which may come to his knowledge.

And the Penal Code of California declares (section 197) that homicide is justifiable when committed by any person “when resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person,” or “when committed in defense of habitation, property, or person against one who manifestly intends or endeavors, by violence or surprise, to commit a felony.” That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties, violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California—are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge FIELD, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing his duty, it became necessary, for the protection of Judge FIELD or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed—the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power—there can be no question of the authority of the sheriff to

have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty—a duty which he had no liberty to refuse to perform—to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

But, all these questions being conceded, it is urged against the relief sought by this writ of *habeas corpus* that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California, and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offense charged against the prisoner consists in an act done in pursuance of a law of the United States, and by virtue of its authority, and where the imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language.

The enactments now found in the Revised Statutes of the United States on the subject of the writ of *habeas corpus* are the result of a long course of legislation forced upon Congress by the attempt of the States of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the States denied. The original act of Congress on the subject of the writ of *habeas corpus*, by its fourteenth section, authorized the judges and the courts of

the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment: 1 Stat. at Large 81. This did not present the question, or at least it gave rise to no question which came before the courts, as to releasing by this writ, parties held in custody under the laws of the States. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that State, and held by the State authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly the act of Congress of March 2, 1833 (4 Stat. at Large 634), among other remedies for such condition of affairs, provided by its seventh section, that the federal judges should grant writs of *habeas corpus* in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof.

The next extension of the circumstances on which a writ of *corpus habeas* might issue by the federal judges arose out of the celebrated McLeod Case, in which McLeod, charged with murder, in a State court of New York, had pleaded that he was a British subject, and that what he had done, was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that State. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the State of New York, the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the State of New

York. This led to an extension of the powers of the federal judges under the writ of *habeas corpus* by the act of August 29, 1842 (5 Stat. at Large 539), entitled "An act to provide further remedial justice in the courts of the United States." It conferred upon them the power to issue a writ of *habeas corpus* in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill, which afterwards became a law on this subject, Senator Berrien, who introduced it into the Senate, observed:

The object was to allow a foreigner prosecuted in one of the States of the Union for an offense committed in that State, but which, he pleads, has been committed under authority of his own sovereignty or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations; and showing this, the writ of *habeas corpus* is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison, awaiting the proceedings of the State jurisdiction in the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief.

No more forcible statement of the principle on which the law of the case now before us stands can be made.

The next extension of the powers of the court under the writ of *habeas corpus* was the act of February 5, 1867 (14 Stat. at Large 385); and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the Constitution or a law or treaty of the United States, and declares that "the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and, if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."

It would seem as if the argument might close here. If

the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of *habeas corpus* one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law and the directions of his superior officers of the Department of Justice, we can see no reason why this writ should not be made to serve its purpose in the present case. We have already cited such decisions of this Court as are most important and directly in point, and there is a series of cases decided by the circuit and district courts to the same purport. Several of these arose out of proceedings under the fugitive slave law, in which the marshal of the United States, while engaged in apprehending the fugitive slave with a view to returning him to his master in another State, was arrested by the authorities of the State. In many of these cases, they made application to the judges of the United States for relief by the writ of *habeas corpus*, which gave rise to several very interesting decisions on this subject. In *Ex parte Jenkins* (1853), U. S. C. Ct., E. D. Pa., 2 Wall. Jr. 521, 529, the Marshal, who had been engaged, while executing a warrant, in arresting a fugitive, in a bloody encounter, was himself arrested under a warrant of a Justice of the Peace for assault with intent to kill, which makes the case very analogous to the one now under consideration. He presented to the Circuit Court of the United States for the Eastern District of Pennsylvania a petition for a writ of *habeas corpus*, which was heard before Mr. Justice GRIER, who held that under the act of 1833, already referred to, the Marshal was entitled to his discharge, because what he had done was in pursuance of and by the authority conferred upon him by the act of Congress concerning the rendition of fugitive slaves. He said :

The authority conferred on the judges of the United States by this act of Congress gives them all the power that any other court could exercise under the writ of *habeas corpus*, or gives them none at all. If, under such a writ, they may not discharge their officer when imprisoned "by any

authority " for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. * * * It was passed when a certain State of this Union had threatened to nullify acts of Congress, and to treat those as criminals who should attempt to execute them ; and it was intended as a remedy against such State legislation.

This same matter was up again when the fugitive slave, Thomas, had the marshal arrested in a civil suit for an alleged assault and battery. He was carried before Judge KANE on another writ of *habeas corpus*, and again released : Id. 531. A third time the Marshal, being indicted, was arrested on a bench warrant, issued by the State court, and again brought before the Circuit Court of the United States by a writ of *habeas corpus*, and discharged. Some remarks of Judge KANE on this occasion are very pertinent to the objections raised in the present case. He said : Id. 543.

It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them [in the State court], will, in effect, prevent their trial by jury at all, since there is no act of Congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this Court shall interfere with the trial of these prisoners by a jury. Our constitutions secure that mode of trial as a right to the accused ; but they nowhere recognize it as a right of the government, either State or federal, still less of an individual prosecutor. The action of a jury is overruled constantly by the granting of new trials after conviction. It is arrested by the entering of *nolle prosequi* while the case is at bar. It is made ineffectual at any time by the discharge on *habeas corpus*. * * * And there is no harm in this. No one imagines that because a man is accused he must therefore, of course, be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals, still less of retaliating them.

Many other decisions by the circuit and district courts to the same purport are to be found, among them the following : *Ex parte Robinson* (1855), U. S. C. Ct., D. Ohio, 6 McLean 355 ; *U. S. v. Jailer of Fayette Co.* (1867), U. S. C. Ct., D. Ky., 2 Abb. 265 ; *Ramsey v. Jailer of Warren Co.* (1879), U. S. D. Ct., D. Ky., 2 Flip. 451 ; *In re Neill* (1871), U. S. C. Ct., S. D. N. Y., 8 Blatchf. 156 ; *Ex parte Bridges* (1875), U. S. C. Ct., N. D. Ga., 2 Woods, 428 ; *Ex parte Royall* (1886), 117 U. S. 241. Similar language was used by Mr. Choate in the Senate of the United States upon the passage of the act of 1842. He said :—

If you have the power to interpose after judgment, you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition. If, within the Constitution, your judicial power extends to these cases or these controversies, whether you take hold of the case or controversy at one stage or another is totally immaterial. The single question submitted to the national tribunal, the question whether, under the statute adopting the law of nations, the prisoner is entitled to the exemption or immunity he claims, may as well be extracted from the entire case, and presented and decided in those tribunals before any judgment in the State court, as for it to be revised afterwards on a writ of error. Either way, they pass on no other question. Either way they do not administer the criminal law of a State. In the one case as much as in the other, and no more, do they interfere with State judicial power.

The same answer is given in the present case. To the objection, made in argument, that the prisoner is discharged by this writ from the power of the State court to try him for the whole offense, the reply is that if the prisoner is held in the State court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as Marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the State court, or in any court. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offense to be submitted to a jury; and, if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our

duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves, as far as possible, in the place of the Circuit Court, and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require. The result at which we have arrived upon this examination is that, in the protection of the person and the life of Mr. Justice FIELD while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that, without prompt action on his part, the assault of Terry upon the Judge would have ended in the death of the latter; that, such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the Sheriff of San Joaquin county.

FIELD, J., did not sit at the hearing of this case, and took no part in its decision.

LAMAR, J., (*dissenting*). The Chief Justice and myself are unable to assent to the conclusion reached by the majority of the Court. Our dissent is not based on any conviction as to the guilt or innocence of the appellee. The view which we take renders that question immaterial to the inquiry presented by this appeal. That inquiry is, whether the appellee, Neagle, shall in this *ex parte* proceeding be discharged and delivered from any trial or further inquiry in any court, State or federal, for what he has been accused of in the forms prescribed by the Constitution and laws of the State in which the act in question was committed. Upon

that issue, we hold to the principle announced by this court in the case of *Ex parte Crouch* (1884), 112 U. S. 178, 180, in which Mr. Chief Justice WAITE, delivering the opinion of the Court, said :—

It is elementary learning that, if a prisoner is in the custody of a State court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on *habeas corpus* issued by a court of the United States simply because he is not guilty of the offense for which he is held. All questions which may arise in the orderly course of the proceeding against him are to be determined by the court to whose jurisdiction he has been subjected, and no other court is authorized to interfere to prevent it. Here the right of the prisoner to a discharge depends alone on the sufficiency of his defense to the information under which he is held. Whether his defense is sufficient or not is for the court which tries him to determine. If, in this determination, errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose. The office of a writ of *habeas corpus* is neither to correct such errors, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed. Authorities to this effect in our reports are numerous: *Ex parte Watkins* (1830), 3 Pet. (28 U. S.) 202; *Ex parte Lange* (1873), 18 Wall. (85 U. S.) 163, 166; *Ex parte Parks* (1876), 93 U. S. 18, 23; *Ex parte Siebold* (1879), 100 Id. 371, 374; *Ex parte Virginia* (1879), Id. 339, 343; *Ex parte Rowland* (1881), 104 Id. 603, 612; *Ex parte Curtis* (1882), 106 Id. 371, 375; *Ex parte Yarbrough* (1884), 110 Id. 651, 653.

Many of the propositions advanced in behalf of the appellee, and urged with impressive force, we do not challenge. We do not question, for instance, the soundness of the elaborate discussion of the history of the office and function of the writ of *habeas corpus*, its operation under and by virtue of Section 753 of the Revised Statutes, or the propriety of its use in the manner and for the purposes for which it has been used in any case where the prisoner is under arrest by a State for an act done "in pursuance of a law of the United States." Nor do we contend that any objection arises to such use of the writ, and based merely on that fact, in cases where no provision is made by the federal law for the trial and conviction of the accused. Nor do we question the general propositions that the federal government established by the Constitution is absolutely sovereign over every foot of soil and over every person within the national territory, within the sphere of action assigned to it; and that within

that sphere its Constitution and laws are the supreme law of the land, and its proper instrumentalities of government can be subjected to no restraint, and can be held to no accountability whatever. Nor, again, do we dispute the proposition that whatever is necessarily implied in the Constitution and laws of the United States is as much a part of them as if it were actually expressed. All these questions we pretermit. The recognition by this Court, including ourselves, of their soundness, does not in the least elucidate the case; for they lie outside of the true controversy.

The ground on which we dissent, and which in and by itself seems to be fatal to the case of the appellee, is this: that, in treating Section 753 of the Revised Statutes as an act of authority for this particular use of the writ, a wholly inadmissible construction is placed on the word "law," as used in that statute, and a wholly inadmissible application is made of the clause "in custody in violation of the Constitution * * * of the United States." It will not be necessary to consider these two propositions separately, for they are called into this case as practically one. The section referred to is as follows:

The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States, etc.

It is not contended in behalf of the appellee that the writ of *habeas corpus* could be used, as here it is, in any case, without authority of a statute. In *Ex Parte Bollman* (1807), 4 Cranch (8 U. S.) 75, 94, Chief Justice MARSHALL said:

The power to award the writ [of *habeas corpus*] by any of the courts of the United States must be given by written law.

It is not contended that there is any statute other than those now found in the Revised Statutes of the United States. Nor is it contended that in those statutes there is

any authority for the use here made of the writ other than what is embraced in the clauses above quoted. The issue, as stated above, is thus narrowed to the proper force to be attributed to those clauses.

It is stated as the vital position in appellee's case, that it is not supposed that any special act of Congress exists which authorizes the marshals or deputy-marshals of the United States, in express terms, to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons; that, in the view taken of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law," within the meaning of this phrase; and that it would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there was to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments might operate unfavorably. In considering this position, it is indispensable to observe carefully the distinction between the individual man, Neagle, and the same person in his official capacity as a deputy-marshal of the United States, and also the individual man whose life he defended, and the same person in his official capacity of a Circuit Justice of the United States. The practical importance of the distinction between the rights and liabilities of a person in his private character and the authority and immunity of the same person in his official capacity is clearly pointed out and illustrated in *U. S. v. Kirby* (1868), 7 Wall. (74 U. S.) 482, 486, in which the court says:

No officer or employe of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the Constitution and laws. [And the court adds:] Indeed, it may be doubted whether

it is competent for Congress to exempt the employes of the United States from arrest on criminal process from the State courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But, whether legislation of that character be Constitutional or not, no intention to extend such exemption should be attributed to Congress, unless clearly manifested by its language.

Now, we agree, taking the facts of the case as they are shown by the record, that the personal protection of Mr. Justice FIELD as a private citizen, even to the death of Terry, was not only the right, but was also the duty, of Neagle, and of any other by-stander; and we maintain that for the exercise of that right or duty he is answerable to the courts of the State of California, and to them alone. But we deny that, upon the facts of this record, he, as Deputy-Marshall Neagle, or as Private Citizen Neagle, had any duty imposed on him by the laws of the United States growing out of the official character of Judge FIELD as a Circuit Justice. We deny that anywhere in this transaction, accepting throughout the appellee's version of the facts, he occupied in law any position other than what would have been occupied by any other person who should have interfered in the same manner, in any other assault of the same character, between any two other persons in that room. In short, we think that there was nothing whatever, in fact, of an official character in the transaction, whatever may have been the appellee's view of his alleged official duties and powers; and, therefore, we think that the courts of the United States have, in the present state of our legislation, no jurisdiction whatever in the premises, and that the appellee should have been remanded to the custody of the Sheriff.

The contention of the appellee, however, is, that it was his official duty, as United States Marshal, to protect the Justice; and that for so doing, in discharge of this duty, "which could only arise under the laws of the United States," his detention by the State courts brings the case within section 753 of the Revised Statutes, as aforesaid. We shall therefore address ourselves, as briefly as is consistent with the gravity of the question involved, to a consideration of the

justice of that claim. We must, however, call attention again to the formal and deliberate admission that it is not pretended that there is any single, specific statute making it, in so many words, Neagle's duty to protect the Justice. The position assumed is, and is wholly, that the authority and duty to protect the Justice did arise directly and necessarily out of the Constitution and positive Congressional enactments.

The Attorney General of the United States has appeared in this case for the appellee, in behalf of the government; and, in order that the grounds upon which the government relies in support of its claim against the State of California, that Neagle should be discharged on this writ, may fully appear, it is proper to give some of his most important propositions in his own language. He maintains that—

It was the duty of the judiciary, having been thus protected by the executive department, to sit in judgment upon and to vindicate the officer of the executive department, if innocent, in the discharge of his duty, because such authority in the federal judiciary is essential, in principle, to the existence of the nation.

We insist that, by the Constitution of the United States, a government was created, possessed of all the powers necessary to existence as an independent nation; that these powers were distributed in three great Constitutional Departments; and that each of these Departments is by that Constitution invested with all of those governmental powers naturally belonging to such Department which have not been expressly withheld by the terms of the Constitution.

In other words, that Congress is invested not only with expressed, but with implied, legislative powers; that the judiciary is invested not only with express powers granted in the Constitution as its share of the government, but with all the judicial powers which have not been expressly withheld from it; and that the President, in like manner, by the very fact that he is made the Chief Executive of the nation, and is charged to protect, preserve, and defend the Constitution, and to take care that the laws are faithfully executed, is invested with necessary and implied executive powers which neither of the other branches of the government can either take away or abridge; that many of these powers, pertaining to each branch of the government, are self-executing, and in no way dependent, except as to the ways and means, upon legislation.

The Constitution provides that before the President enters upon the execution of his office he shall take an oath: 'I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States' [And he asks:] Has this clause no signifi-

rance? Does it not, by necessary implication, invest the President with self-executing powers—that is, powers independent of statute?

In reply to these propositions, we have this to say: We recognize that the powers of the government, "within its sphere," as defined by the Constitution and interpreted by the well-settled principles which have resulted from a century of wise and patriotic analysis, are supreme; that these supreme powers extend to the protection of itself and all of its agencies, as well as to the preservation and the perpetuation of its usefulness; and that these powers may be found not only in the express authorities conferred by the Constitution, but also in necessary and proper implications. But, while that is all true, it is also true that the powers must be exercised not only by the organs, but also in conformity with the modes, prescribed by the Constitution itself. These great federal powers, whose existence in all their plenitude and energy is incontestable, are not autocratic and lawless. They are organized powers committed by the people to the hands of their servants for their own government, and distributed among the legislative, executive, and judicial departments. They are not *extra* the Constitution; for, in and by that Constitution, and in and by it alone, the United States, as a great, democratic, federal republic, was called into existence, and finds its continued existence possible. In that instrument is found not only the answer to the general line of argument pursued in this case, but also to the specific question propounded by the Attorney General in respect to the President's oath, and its implications.

The President is sworn to "preserve, protect, and defend the Constitution." That oath has great significance. The sections which follow that prescribing the oath (Sections 2 and 3 of Article 2) prescribe the duties and fix the powers of the President. But one very prominent feature of the Constitution which he is sworn to preserve, and which the whole body of the judiciary are bound to enforce, is the closing paragraph of section 8, art. 1, in which it is declared that—

The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

This clause is that which contains the germ of all the implication of powers under the Constitution. It is that which has built up the Congress of the United States into the most august and imposing legislative assembly in the world, and which has secured vigor to the practical operations of the government, and at the same time tended largely to preserve the equilibrium of its various powers among its co-ordinate departments, as partitioned by that instrument. And that clause alone conclusively refutes the assertion of the Attorney General that it was "the duty of the Executive Department of the United States to guard and protect at any hazard the life of Mr. Justice FIELD in the discharge of his duty, because such protection is essential to the existence of the government." Waiving the question of the essentiality of any such protection to the existence of the government, the manifest answer is that the protection needed and to be given must proceed not from the President, but primarily from Congress.

Again, while it is the President's duty to take care that the laws be faithfully executed, it is not his duty to make laws or a law of the United States. The laws he is to see executed are manifestly those contained in the Constitution and those enacted by Congress, whose duty it is to make all laws necessary and proper for carrying into execution the powers of those tribunals. In fact, for the President to have undertaken to make any law of the United States pertinent to this matter would have been to invade the domain of power expressly committed by the Constitution exclusively to Congress. That body was perfectly able to pass such laws as it should deem expedient in reference to such matter. Indeed, it has passed such laws in reference to elections, expressly directing the United States Marshals to attend places of election, to act as peace-officers, to arrest with and without process, and to protect the supervisors of election in the

discharge of their duties; and there was not the slightest legal necessity out of which to imply any such power in the President. For these reasons, the letters of the Attorney General to Marshal Franks, granting that they did import what is claimed, and granting that the Attorney General was to all intents and purposes, *pro hac vice*, the President, invested Neagle with no special powers whatever. They were, if so construed, without authority of law; and Neagle was then and there a simple Deputy-Marshall—no more and no less.

To illustrate the large sphere of powers self-executing and independent of statutes claimed to be vested in the Executive, reference is made to the continually recurring cases of the President's interference for the protection of our foreign born and naturalized citizens on a visit to their native country; and we are cited, as a striking instance of the exercise of such power, to the case of Martin Kozsta, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen, and who, while at Smyrna, was seized by order of an Austrian official and confined on board an Austrian vessel, and who, being afterwards delivered up to Captain Ingraham, commanding an American war vessel, in compliance with a demand backed by a demonstration of force on the part of that officer, was placed in the hands of a French consul subject to negotiations between the American and Austrian governments, resulting in the famous correspondence between the American Secretary of State, Mr. Marcy, and the Chevalier Hulsemann, representing the Austrian government, and the restoration of Kozsta to freedom. We are asked; upon what express statute of Congress then existing can this act of the government be justified? We answer, that such action of the government was justified because it pertained to the foreign relations of the United States, in respect to which the federal government is the exclusive representative and embodiment of the entire sovereignty of the nation, in its united character; for to foreign nations, and in our intercourse with them, States and State

governments, and even the internal adjustment of federal power, with its complex system of checks and balances, are unknown, and the only authority those nations are permitted to deal with is the authority of the nation as a unit. That authority the Constitution vests expressly and conclusively in the treaty-making power, the President and Senate, by one simple and comprehensive grant.

He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.

This broad grant makes enumeration of particular powers unnecessary. All other delegations of powers in reference to the international relations of this country are carefully and specifically enumerated and assigned, one by one, to their designated departments. In reply, therefore, to the question, what law expressly justifies such action? we answer, the organic law, the Constitution, which expressly commits all matters pertaining to our diplomatic negotiations to the treaty-making power.

Other cases are referred to in illustration of the same point; but the one which it is alleged presents that principle in the most imposing form is that of *U. S. v. Tin Co.* (1888), 125 U. S. 273. In that case a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of land, on the ground that it had been obtained from the government by fraud and deceit practiced upon its officers. There are, it is true, some expressions in the opinion delivered in that case which seem to admit that there is no specific act of Congress expressly authorizing the Attorney General to bring suit for the annulment of a patent procured by fraud from the government; but a close examination of the doctrine of the Court shows that it goes no further than the assertion that the authority of the Attorney General arises, by implication, directly and immediately, out of the express law of Congress. The opinion quotes the clause of the Constitution which declares that the judicial power shall

extend to all cases to which the United States shall be a party, and says that this means, mainly, where it is a party plaintiff. It then refers to the statute of Congress which expressly directs the United States district attorneys to bring suits in behalf of the government, and that the suits thus brought by them are to be under the immediate superintendence and control of the Attorney General. The utmost extent to which the court goes is that, while admitting there is no express authority in the Attorney General to institute the suit, yet such authority is directly and necessarily involved in the express provisions of the statute vesting him with the entire control and superintendence of such suits, and the provision and control of the district attorneys in their conduct of them.

Equally conclusive is the answer which the Constitution makes to the assertion that by the Constitution the judiciary is invested not only with the express powers granted in the Constitution as its share of the government, but with all the judicial powers which have not been expressly withheld from it. It may be found in the clause which declares that "the Congress shall have power * * * to constitute tribunals inferior to the Supreme Court," and in that which declares it shall make all laws necessary and proper for carrying into execution the powers of those tribunals. The correlation between those clauses is manifest and unmistakable. If Congress can and must, by the very terms of the Constitution, make all laws proper for carrying into execution all the powers of any department of the government, and if it can create the circuit court, expand its powers, abridge them, and abolish the court, at will, how can it be that that court, at the least, shall have any implied powers derived from the Constitution and independent of the statutes? And yet in this transaction it must be remembered that Mr. Justice FIELD is only claimed to be the representative of that court.

Not only do the foregoing views seem to us to be the logical and unavoidable results of original and independent studies of the Constitution, but they are also sustained and

enforced by a long series of judicial recognitions and assertions. In *U. S. v. Fisher* (1804), 2 Cranch (6 U. S.) 358, 396, Chief Justice MARSHALL, in delivering the opinion of the court, said of the clause above relied on:

In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution.

In *McCulloch v. Maryland* (1819), 4 Wheat. (17 U. S.) 316, 420, 421, Chief Justice MARSHALL, for the court, delivered one of those opinions which are among the chief ornaments of American jurisprudence. It is largely devoted to an exhaustive analysis of the Constitutional clause in question. Among other things, he says:

The result of the most careful and attentive consideration bestowed upon this clause is that, if it does not enlarge, it cannot be construed to restrain, the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the Constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble. We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people.

In *U. S. v. Reese* (1876), 92 U. S. 214, 217, Chief Justice WARRE, delivering the opinion of the Court, said:

Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected.

In *Strauder v. West Virginia* (1880), 100 U. S. 303, 310, the Court say:

A right or an immunity, whether created by the Constitution or only guarantied by it, even without any express delegation of power, may be protected by Congress.

Cooley, in his work on Constitutional Limitations, *19, collates from the numerous adjudications of this Court, cited by him, the following principles:

So far as that instrument [the Constitution] apportions powers to the national judiciary, it must be understood, for the most part, as simply authorizing Congress to pass the necessary legislation for the exercise of those powers by the federal courts, and not as directly, of its own force, vesting them with that authority. The Constitution does not, of its own force, give to national courts jurisdiction of the several cases which it enumerates; but an act of Congress is essential, first, to create courts, and afterwards to apportion the jurisdiction among them. The exceptions are of those few cases of which the Constitution confers jurisdiction upon the Supreme Court by name; and, although the courts of the United States administer the common law in many cases, they do not derive authority from the common law to take cognizance of and punish offenses against the government. Offenses against the nation are defined, and their punishment prescribed, by acts of Congress.

In a note to this paragraph he says:

Demurrer to an indictment for libel upon the President and Congress. By the Court: "The only question which this case presents is whether the circuit courts can exercise a common-law jurisdiction in criminal cases. * * * The general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition. The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States. Whatever is not expressly given to the former, the latter expressly reserve. * * * It is not necessary to inquire whether the general government, in any and to what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present. It is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation:" *U. S. v. Hudson* (1812), 7 Cranch. (11 U. S.) 32. See *U. S. v. Coolidge* (1816), 1 Wheat. (14 U. S.) 415. "It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption:" Per McLEAN, J., *Wheaton v. Peters* (1834), 8 Pet. (33 U. S.) 658; and citing many other authorities.

In *Tennessee v. Davis* (1880), 100 U. S. 257, 267, referring to the judiciary act of 1789, the Court said:

It [the Constitution] did not attempt to confer upon the federal courts all the judicial power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required, etc.

It would seem plain, therefore, that if the Constitution means anything, and if these judicial utterances, extending, as they do, over a period of eighty years, and embracing a variety of interests, mean anything, they mean that the power to provide and prescribe the laws necessary to effectuate the governmental and official powers of the United States and its officers is vested in Congress.

The *gravamen* of this case is in the assertion that Neagle slew Terry in pursuance of a law of the United States. He who claims to have committed a homicide by authority, must show the authority. If he claims the authority of law, then what law? And if a law, how came it to be a law? Somehow and somewhere it must have had an origin. Is it a law because of the existence of a special and private authority issued from one of the executive departments? So, in almost these words, it is claimed in this case. Is it a law because of some Constitutional investiture of sovereignty in the persons of judges, who carry that sovereignty with them wherever they may go? Because of some power inherent in the judiciary to create for others a rule or law of conduct outside of legislation, which shall extend to the death penalty? So, also, in this case, *in totidem verbis*, it is claimed. We dissent from both these claims. There can be no such law from either of those sources. The right claimed must be traced to legislation of Congress, else it cannot exist. If it be said that Congress has the power to make such laws, yet, in the absence of statutes from that source, other departments may act in the premises; or if it be said that the possession of that power by the government does not negative the existence of similar powers in other departments of the government—the response that these powers are plainly not concurrent, but are exclusive, can be

made in the language of Mr. Justice STORY, in *Prigg v. Pennsylvania* (1842), 16 Pet. (41 U. S.) 539, 617. Speaking of the fugitive slave law of 1793, he says:

If Congress have a Constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, * * * in such a case the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.

If it be said that that case had reference to the interference of a State with Congressional powers, while in the case at bar no such question is involved, the answer is that the difference is favorable, and not adverse, to the theory of this opinion. The principle is the same; and, if that principle can be applied, as applied it was, to the denial to a State legislature of the powers previously enjoyed over matters originally appertaining to it, *a mullo fortiori* will it apply to the exclusion of two co-ordinate departments of the same government from powers which they never possessed.

As before stated, if the killing of Terry was done "in pursuance of a law of the United States," that law had somewhere an origin. There are, under the general government, only two possible sources of law. The common law never existed in our federal system. The legislative power possessed by the United States must be found either exercised in the Constitution as fundamental law, or by some body or person to whom it was delegated by the Constitution. It has already been pointed out that the Constitution does not itself create any such law as that contended for, and that it could not have been created by any executive or judicial action or *status* is made manifest, not only by the clause in Section 8, Art. I, already cited and commented on, but also by Section 1, Art. I, and the two paragraphs of Article 6. Section 1, Art. I, provides that—

All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

The second paragraph of Article 6 provides that—

The laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.

Now, what is it that constitutes the supreme laws of which so much is said in this case? How distinctly, how plainly, and how fully the Constitution answers. The Constitution itself, the treaties, and the laws made in pursuance of the Constitution. Made by whom? By Congress, manifestly. The two clauses already quoted give the power of legislation in the most sweeping terms. It alone has power to make any law. Anything purporting to be a law not enacted by Congress would not be "in pursuance of" any provision of the Constitution. Thus we are driven to look for the source of this asserted law to some legislation of Congress, legislation made under either its express Constitutional authority, or under its properly implied authority—it is immaterial which; and there is none of either class. The authority is sought to be traced here through the self-preservative power of the federal judiciary implied from the Constitution, and then through the obligation of the Executive to protect the judges, implied from the Constitution, whereas there is no such implication in either case, for the simple but all-sufficient reason that by the Constitution itself, the whole of those functions is committed to Congress.

Since then, the Constitution did not, by its own direct provisions, regulate this matter, but committed it to the hands of Congress, with full powers in the premises, it is only by the enactment of some law of Congress that the appellee can show that he is in custody "in violation of the Constitution."

As previously remarked, the two propositions are, as to this case, essentially one. Turning again to the statute under which the writ is sued out, we find that the clause relied on is that which makes the writ applicable where the person "is in custody for an act done or omitted in pursuance of a law of the United States." The question then

arises, what sort of law? What does the expression import? Is it not plain that it means just what the same expression all through the Constitution imports? If that instrument, which is the fountain of the federal power, be consulted, it will be found that in it, and the amendments thereto, the word "law," in either its singular form or its plural, "laws," is used forty-two times. Of these instances of that use, sixteen are where the word is used in reference to the jurisprudence of the States and of the law of nations, or where they are merely terms of description, such as "courts of law," "cases in law and equity," etc. Of the other instances of its use, and which all have reference to that body of rules which constitute the jurisprudence distinctly of the United States, there are only three cases in which it is not manifest that the word is used as equivalent to "statutes," "enactments of the Congress;" and it is clear, in those three instances, the word is used, also, as equivalent to "statutes." The following are examples:

The Congress may at any time, by law, make or alter such regulations [in regard to the election of Senators and Representatives]. Article 1, § 4.

Every bill * * * shall, before it become a law, be presented, etc. Article 1, § 7.

Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcies, etc. Article 1, § 8.

Congress shall have power * * * to make all laws which shall be necessary and proper, etc. Article 1, § 8.

No bill of attainder or *ex post facto* law shall be passed. Article 1, § 9.

Congress shall make no law respecting an establishment of religion. First Amendment.

It would be tedious, and it is unnecessary, to set them all forth. They all have the same manifest meaning of "statutes," except three, and in those three instances, the words do not mean anything other than statutes. We think it plain that the expression, "a law of the United States," as used in Section 753 of the Revised Statutes, means just what the similar expression means all through the Constitution, and that is, "a statute of the United States:" *Tennessee v. Davis* (1880), 100 U. S. 264.

Of the decisions of this Court, cited as authority to sustain the order discharging the appellee, *Ex parte Siebold* (1880), 100 U. S. 371, and *Tennessee v. Davis*, *supra*, are relied on as having the most direct bearing on the case. We do not consider *Ex parte Siebold* as being adverse to the proposition which we maintain. In that case, the existence of express statutes upon which the controversy arose was undisputed. The sole question was as to the Constitutional competency of Congress to pass certain laws which, in the most express, explicit, and imperative words, required marshals and deputy-marshals of the United States to attend places for the election of members of Congress, to keep the peace at the polls, make arrests, and protect the supervising officers in the discharge of their duties at those elections. The Court decided that the enactments of Congress in question were Constitutional. The power of Congress to pass these laws being thus settled, no assertion as to the powers of the marshals and deputy-marshals to execute them in the States can be found in that able opinion which do not follow as a logical consequence. We fail to see anywhere in the decision any intimation that, independently of such legislation, the officers therein named could, by virtue of their office, have exercised the same powers in obedience to the instructions of an executive department, in the exercise of its authority implied from the Constitution. In *Tennessee v. Davis*, the case was removed from a State court to the circuit court of the United States under the express provisions of Section 643 of the Revised Statutes. The homicide for which the petitioner was prosecuted, was committed by him while executing his duties as a revenue officer, in pursuance of the express requirements of the revenue laws, and in defense of his own life, upon a party offering unlawful resistance. So far from running counter to the position we are seeking to maintain, we think the principle there laid down on the point we are now discussing is in accord with that position. The language of the court, through Mr. Justice STRONG, who delivered its opinion, is as follows :—

Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted: 2 Story, Const. § 1647; *Cohens v. Virginia* (1821), 6 Wheat. (19 U. S.) 379.

While it is true that the opinions in both of those cases assert in the strongest and most impressive language the supremacy of the government of the United States in the exercise of the powers conferred upon it by the Constitution, we regard them, also, as a vindication of Congress as the law-making department of the government, as the depository of the implied and constructive powers of the government, or, as Mr. Chief Justice MARSHALL expresses it, of the power "to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble." As the *Sicbold Case* and *Tennessee v. Davis* have been referred to as the most important and directly in point in support of the opposite view, we do not deem it necessary to give an extended examination of the series of cases decided by the circuit and district courts cited to the same purport. *Ex parte Jenkins* (1853), U. S. C. Ct., E. D. Pa., 2 Wall. Jr. 521, to which attention is more especially called, combined in itself the main features of most of the others, which were proceedings under the fugitive slave law, in which United States marshals were arrested while executing process under that law by State officers acting under the authority of the statutes of the State, the inevitable effect, if not the avowed object, of which were to nullify the operation of the aforesaid act of Congress. This was so in *Ex parte Jenkins*. The United States Marshal was arrested on a warrant issued by a State magistrate while he was executing a warrant issued under said law of Congress. He was brought before the Circuit Court of the United States for the Eastern District of Pennsylvania, on a writ of *habeas corpus*, and was discharged upon the ground that the fugitive slave law, having been enacted in pursuance of the Constitution of the United States, was paramount to the law of Pennsylvania in conflict with it,

and that the Marshal, being in custody for an act done in pursuance of that law of Congress, and in execution of process under it, was entitled to his discharge. It is so manifest that that case was within the provision of Section 753 of the Revised Statutes, that further comment is unnecessary, and the same may be said of all of the other decisions of the circuit and district courts. In every one of them the party discharged was in custody either for an act done in pursuance of an express statute of Congress, or in the execution of a decree, order, or process of a court, or the custody was in violation of the Constitution of the United States.

We stated at the outset of these remarks that we raised no question upon the discussion of the history of the legislation of Congress upon the subject of the writ of *habeas corpus*. We think, however, it is pertinent, in this connection, to inquire what was the necessity for any such legislation at all, if the theory contended for as to the sufficiency of the self-executing powers of the executive and judicial departments of the government to protect all the agencies and instrumentalities of the federal government is correct. Why could not President Jackson, in 1833, as the head of the executive department, invested with the power, and charged with the duty, to take care that the laws be faithfully executed, and to defend the Constitution, have enforced the collection of the federal revenues in the port of Charleston, and have protected the revenue officers of the government against any arrest made under the pretensions of State authority, without the aid of the act of 1833? Why, in 1842, when the third *habeas corpus* act was passed, could not the President of the United States, by virtue of the same self-executing powers of the Executive, together with those of the judicial department, have enforced the international obligations of the government without any such act of Congress? It is a noteworthy fact in our history that whenever the exigencies of the country, from time to time, have required the exercise of executive and judicial power for the enforcement of the supreme authority of the United States government for the protection of its agencies, etc., it was

found, in every instance, necessary to invoke the interposition of the power of the national legislature. As early as 1807, in *Ex parte Bollman* (1807), 4 Cranch. (8 U. S.) 75, 94, Chief Justice MARSHALL said:—

The power to award the writ [of *habeas corpus*] by any of the courts of the United States must be given by written law. * * * The inquiry, therefore, on this motion, will be whether, by any statute compatible with the Constitution of the United States, the power to award a writ of *habeas corpus* in such case as that of Erick Bollman and Samuel Swartwout has been given to this court.

It is claimed that such a law is found in Section 787 of the Revised Statutes, which is as follows:—

It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty.

It is contended that the duty imposed upon the marshal of each district by this section is not satisfied by a mere formal attendance upon the judges while on the bench; but that it extends to the whole term of the courts while in session, and can fairly be construed as requiring him to attend the judge while on his way from one court to another, to perform his duty. It is manifest that the statute will bear no such construction. In the first place, the judge is not the court. The person does not embody the tribunal, nor does the tribunal follow him in his journeys. In the second place, the direction that he shall attend the court confers no authority or power on him of any character. It is merely a requirement that he shall be present, in person, at the court when sitting, in order to receive the lawful commands of the tribunal, and to discharge the duties elsewhere imposed upon him. Great as the crime of Terry was in his assault upon Mr. Justice FIELD, so far from its being a crime against the court, it was not even a contempt of court, and could not have received adequate punishment as such. Section 725 of the Revised Statutes limits contempt to cases of misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.

It is claimed that the law needed for appellee's case can be found in Section 788 of the Revised Statutes. That section is as follows :—

The marshals and their deputies shall have in each State the same powers in executing the laws of the United States as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof.

It is then argued that, by the Code of California, the sheriff has extensive powers as a conservator of the peace, the statutes to that effect being quoted *in extenso*; that he also has certain additional common-law powers and obligations to protect the judges, and to personally attend them on their visits to that State; that, therefore, no statutory authority of the United States for the attendance on Mr. Justice FIELD by Neagle, and for Neagle's personal presence on the scene, was necessary; and that that statute constituted Neagle a peace-officer to keep the peace of the United States. This line of argument seems to us wholly untenable. By way of preliminary remark, it may be well to say that, so far as the simple fact of Neagle's attendance on Mr. Justice FIELD, and the fact of his personal presence are concerned, no authority, statutory or otherwise, was needed. He had a right to be there; and, being there, no matter how or why, if it became necessary to discharge an official duty, he would be just as much entitled to the protection of Section 753 of the Revised Statutes as if he had been discharging an official duty in going there. The fallacy in the use made of Section 788 in the argument just outlined is this: That section gives to the officers named the same measure of powers when in the discharge of their duties as those possessed by the sheriffs, it is true; but it does not alter the duties themselves. It does not empower them to enlarge the scope of their labors and responsibilities, but only adds to their efficiency within that scope. They are still, by the very terms of the statute itself, limited to the execution of "the laws of the United States," and are not in any way, by adoption, mediate or immediate, from the Code or the common law, authorized to execute the laws of Cali-

fornia. The statute, therefore, leaves the matter just where it found it.

If the act of Terry had resulted in the death of Mr. Justice FIELD, would the murder of him have been a crime against the United States? Would the government of the United States, with all the supreme powers of which we have heard so much in this discussion, have been competent, in the present condition of its statutes, to prosecute in its own tribunals the murder of its own Supreme Court Justice, or even to inquire into the heinous offense through its own tribunals? If yes, then the slaying of Terry by the appellee, in the necessary prevention of such act, was authorized by the law of the United States, and he should be discharged, and that independently of any official character; the situation being the same in the case of any citizen. But, if no, how stands the matter then? The killing of Terry was not by the authority of the United States, no matter by whom done, and the only authority relied on for vindication must be that of the State, and the slayer should be remanded to the State courts to be tried. The question then recurs, would it have been a crime against the United States? There can be but one answer. Murder is not an offense against the United States except when committed on the high seas or in some port or harbor without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the national government has exclusive jurisdiction. It is well settled that such crime must be defined by statute, and no such statute has yet been pointed out. The United States government being thus powerless to try and punish a man charged with murder, we are not prepared to affirm that it is omnipotent to discharge from trial, and give immunity from any liability to trial, where he is accused of murder, unless an express statute of Congress is produced permitting such discharge.

We are not unmindful of the fact that in the foregoing remarks we have not discussed the bearings of this decision upon the autonomy of the States, in divesting them of what was once regarded as their exclusive jurisdiction over crimes

committed within their own territory, against their own laws, and in enabling a federal judge or court, by an order in a *habeas corpus* proceeding, to deprive a State of its power to maintain its own public order, or to protect the security of society and the lives of its own citizens, whenever the amenability to its courts of a federal officer or employe or agent is sought to be enforced. We have not entered upon that question because, as arising here, its suggestion is sufficient, and its consideration might involve the extent to which legislation in that direction may Constitutionally go, which could only be properly determined when directly presented by the record in a case before the court for adjudication.

For these reasons, as briefly stated as possible, we think the judgment of the court below should be reversed, and the prisoner remanded to the custody of the sheriff of San Joaquin county, Cal.; and we are the less reluctant to express this conclusion because we cannot permit ourselves to doubt that the authorities of the State of California are competent and willing to do justice, and that, even if the appellee had been indicted and had gone to trial upon this record, God and his country would have given him a good deliverance.

FULLER, C. J., concurred in this dissent.

When the Circuit Court of the United States for the Northern District of California ordered Neagle's discharge, the opinion of Circuit Judge SAWYER was printed in 28 AMERICAN LAW REGISTER 585, with an extended annotation on the summary relief which a Court of the United States could extend to an officer of the United States arrested by State authorities for some act done in the performance of his duty. Such collisions ought not to occur, but the incidents of the cases cited, as well as of this Neagle case, show that they will occur as long as popular feeling is not

restrained by knowledge of the law and of the consequences of disobedience; see *U. S. v. Doss* (1872), 11 AMER. LAW REG. (N. S.) 320 and 28 Id. 647.

The judgment of affirmance in Neagle's case was unanimous upon the power to release Neagle; *supra* page 696. It was the importance of this point together with the improbability of another ex-judge or any citizen, so far forgetting the necessary respect to the judiciary, which caused the annotation in 28 AMERICAN LAW REGISTER 624-53, to be confined to this fundamental point. There could not have well

been any dissent, after the long line of cases which had been actually decided, and for this reason, no doubt, Justice MILLER does not go fully into a review of them. And this is made the more plain by the confession of sovereign power in the United States, even if not expressly, but only necessarily implied from the language of the Constitution, which is made in the dissenting opinion, *supra*, pages 696-7.

The uncertainties which this judgment will eventually remove are presented by Justice LAMAR (dissenting) as merely a construction of the law in pursuance of which Neagle acted. From this narrowness of view, no doubt the Chief Justice and Justice LAMAR failed to apply to one of the two important questions into which this construction is divided by Justice MILLER, the rule to which they assented in the *Original Package Case*. That is, in the latter case, these Justices construed a power conferred upon Congress, without any words affecting the States, to be so exclusive as to prevent the States from acting, even if Congress should refuse to act. But here, the execu-

tive power, broadly conferred upon the President amongst other things, but not in terms exclusively for the faithful execution of the laws, would be restrained to such ways and means as have been specifically indicated by Congressional action. That has not been the rule of construction since MARSHALL, in *McCulloch v. Maryland* (see the quotation, *supra*, pages 423, 706), pointed out that a Constitutional necessity was not an absolute necessity, nor one to be remedied by the most simple and direct means alone, but by those which were useful and advantageous. In other words, the question of necessity related to the end and only to that extent controlled the means.

Want of space near the close of a volume, compels the postponement of an examination into the executive power, and the rights and duties of United States Marshals. The latter will assume a greater importance in the event of the passage of an act or acts of Congress, further regulating the election of Representatives in Congress.

JOHN B. UHLE.

ABSTRACTS OF RECENT DECISIONS.

CONTRACTS.

Public policy forbids the organization of an association for the purpose of increasing the price or decreasing the production of a commodity in general use, such as candles, and a claim based upon an agreement under which such an association has been formed, can receive no aid from a court of justice. *Emery v. Ohio Candle Co.*, S. Ct. Ohio, May 6, 1890.

DECEIT.

Diligent inquiry as to the truth or falsity of representations made by a person seeking to exchange certain stock of a corporation owned by him, for property of another, need not be made by the latter, in order to enable him to maintain an action of deceit based upon the falsity of such representations. *Coltrill v. Crum*, S. Ct. Mo., May 19, 1890.

DEEDS.

Covenant of warranty is not constituted by a *habendum* clause in the following form: "to have and to hold the said land unto the said grantee, his heirs and assigns, forever, as a good and indefeasible estate in fee-simple," nor does the word "grant," when used alone, constitute such a warranty. *Wheeler v. Wayne Co.*, S. Ct. Ill., April 22, 1890.

Delivery after grantor's death of a deed previously executed, in pursuance of instructions given to his agent, conveys no title. *Weisinger v. Cocke*, S. Ct. Miss., May 5, 1890.

Voluntary conveyance from father to a favorite son, who has remained at home and managed the father's farm for many years, is not void as induced by undue influence, although obtained by the son by threatening to leave his father if the deed was not given, where the father, though of advanced age, feeble health and impaired memory, was sound in mind and not so influenced by his son as to be deprived of freedom of will. *Burt v. Quisenberry*, S. Ct. Ill., March 31, 1890.

FIRE INSURANCE.

General agent of an insurance company, having authority "to transact the business of insurance" within a State, may bind the company, after a loss, by a parol waiver of conditions as to proofs of loss, notwithstanding a provision of the policy that a waiver shall be void unless in writing and endorsed thereon. *Phoenix Ins. Co. of Brooklyn v. Bowdre*, S. Ct. Miss., May 5, 1890.

TELEGRAPHS.

Erection of poles and stringing wires by a telegraph company along a highway already dedicated to the public, is an additional servitude, and constitutes a taking of private property for public use; the public have merely the right of passage along and over a highway, the absolute property remaining in the owner of the soil from whom the right of passage was secured. *Western Union Tel. Co. v. Williams*, S. Ct. App. Va., March 27, 1890.

WILLS.

Devise over, after a devise to the wife of testator of all his estate with "full and ample authority to dispose of the whole of it as she pleases," of any property not alienated by her before her death, will take effect upon whatever property has not been so disposed of. *McCullough's Adm'r v. Anderson*, Ct. App. Ky., April 10, 1890.

Devise to wife of all testator's estate, "to have and to hold the same for her own use and benefit, and also to make such disposition of the same that she, in her judgment, may deem best, should it become necessary that a part or all should become necessary for the support of herself and W." was followed by a provision that, after the death of the wife, "any and all property remaining unused shall be given to said W."; the wife took only a life estate, with a power of disposition for the purpose mentioned, and the devise over was valid. *Miller's Admr. v. Potterfield*, S. Ct. App. Va., May 18, 1890.

JAMES C. SELLERS.

THE AMERICAN LAW REGISTER.

NOVEMBER, 1890.

THE LAW GOVERNING AN ORIGINAL PACKAGE.

(Continued from July-August Number, *ante*, page 483).

XII.

The next case, in the order of time, was that of *U. S. v. Holliday*, decided in 1866, and reported in 3 Wall. (70 U. S.) 407. The subject for decision was the extent of the power to regulate commerce with the Indian Tribes, and must be omitted here, from developing no new principles, as may be seen from an examination of the case just alluded to, with those of *U. S. v. 43 Gallons of Whiskey* (1876) 3 Otto (93 U. S.) 188, and *s. c.* (1883) 108 U. S. 491; *U. S. v. LeBris* (1887) 121 U. S. 278; *Bates v. Clark* (1877) 5 Otto (95 U. S.) 204.

XIII.

An original package is one which has been brought from another State or Nation, and not merely one which has paid a tax to the United States.

A license granted under the taxing powers of the United States does not necessarily authorize the carrying on of the business, trade or manufacture licensed; thereby differing from a license under the commerce powers.

An internal revenue license, obtained by a lottery ticket dealer or a retail liquor dealer, does not authorize sales of lottery tickets or liquor. The licensee has merely paid a tax to the United States.

Each State has authority over the business, trade and manufactures of its citizens, until its regulations conflict with the commerce or other Constitutional powers of the United States.

The License Tax Cases (1867), 5 Wall. (72 U. S.) 462, did much towards defining the power of a State over the business or trades of its citizens. The first of these cases was an indictment of Rufus B. Vassar, in the United States Circuit Court for the Northern District of New York, October 20, 1863, for carrying on the business of a lottery ticket dealer without the license required by the Act of Congress:—

CHAP. CXIX. *An Act to provide Internal Revenue to support the Government, and to pay interest on the Public Debt.* (Approved July 1, 1862; 12 Stat. at Large 433.)

SEC. 57. *And be it further enacted*, That from and after the first day of August, eighteen hundred and sixty-two, no person, association of persons, or corporation, shall be engaged in, prosecute, or carry on, either of the trades or occupations mentioned in section sixty-four of this Act, until he, she, or they shall have obtained a license therefor, in the manner hereinafter provided.

This Section was re-enacted in Section seventy-one of the Act of June 30, 1864 (13 Stat. at Large 248), and again by the Act of July 13, 1866 (14 Id. 113), where the word *license* was changed to *special tax*. This was considered by Chief Justice CHASE to be conclusive as to the intention of Congress, when originally imposing this tax, of not intruding upon the strictly internal affairs of a State.

The penalty inflicted by Section fifty-nine of the Act of 1862, (12 Stat. at Large 453) was three times the license; to it was added imprisonment, by Section twenty-four of the Act of March 3, 1863 (Id. 727); and then converted into payment of the license, with fine or imprisonment or both, by Section seventy-three of the Act of June 30, 1864 (13 Id. 249). This was again changed to fine, or imprisonment, or both, by Act of July 13, 1866 (14 Id. 113), and to a fine only by Act of March 2, 1867 (Id. 473). But there was no immunity from punishment under State laws, in any of these Acts.

The Act of 1862 also contained the express disclaimer of

superior authority, in those portions printed in roman type of—

SEC. 67. *And be it further enacted, That no license hereinbefore provided for shall, if granted, be held or construed to exempt any person carrying on the trade, business, or profession specified in said license, from any penalty or punishment provided by the laws of any State for carrying on such trade, business, or profession, within such State, or in any manner authorize the commencement, or continuance of [any] such trade, business, [occupation or employment] or profession [therein mentioned, within any State, or Territory of the United States, in which it is, or shall be specifically prohibited by the laws thereof, or in violation of] contrary to the laws of [any] such State [or Territory], or in places prohibited by municipal law; [Provided, nothing contained in this Act shall] nor shall any such license be held or construed [so as] to prevent or prohibit any State [the several States], from placing a duty or tax [or license, for State or other purposes, on any trade, business, [matter or thing] or profession, [on] for which a [duty, tax, or] license is required [to be paid] by this Act; nor shall any person, carrying on any trade, business or profession, for which a license is required by this Act be exempt from procuring such license, or from any penalty or punishment herein provided, by, or in consequence of, any State law either authorizing or prohibiting such trade, business or profession.*

The *italicised* words were inserted and the bracketed words omitted in the re-enactment of this section by the Act of June 30, 1864 (SEC. 78, 13 Stat. at Large 250-1). These changes are a significant Congressional exposition of the original Act of 1862, long before the Supreme Court came to apply the same interpretation.

Section Sixty-four of the Act of 1862 did not mention lottery ticket dealers, who remained untaxed until the amendatory Act of March 3, 1863, Sec. 37, (12 Stat. at Large 715) which fixed one thousand dollars as the tax; which was the amount fixed by Section seventy-nine of the Act of June 30, 1864 (13 Id. 252). This sum was diminished to one hundred dollars by Section nine of the Act of July 13, 1866, (14 Id. 116) and the tax was finally removed by the Act of July 14, 1870 (16 Id. 256). At no time was there any attempt to give the tax or license an exclusive effect upon State laws.

Section two of the Act of 1863 (12 Stat. at Large 718), required the use of stamps on the lottery tickets; and Sec-

tions one hundred and eleven to thirteen of the Act of 1864 (13 Id. 279) required a tax upon the gross receipts and inflicted money penalties upon both the buyer and seller of unlicensed lottery business, with this significant—

Provided, further, That nothing in this section [113] contained shall be construed to legalize any lottery.

There were other details respecting lotteries in the supplementary Act of March 3, 1865 (13 Stat. at Large 472, 485), but no legalizing clauses.

The sending of letters and circulars respecting lotteries was not forbidden until the Act of July 27, 1868, Section 13, (15 Stat. at Large 196,) so that no such question of illegality hampered the decision of the Supreme Court.

Returning to the case under consideration, it appears that the defendant demurred to the indictment, because the State laws made the carrying on of his business a criminal offense, and he therefore contended that Congress could not license his crime. The Judges of the Circuit Court differing in opinion, the case was certified to the Supreme Court, where Chief Justice CHASE delivered the unanimous opinion of the Court, adverse to the defendant because the payment of the license would not give any rights against the State laws.

Recurring, though without naming the case, to *Gibbons v. Ogden*, the Chief Justice affirmed its particular principle (*ante*, page 428)—

It is not doubted that where Congress possesses Constitutional power to regulate trade, or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give the licensee authority to do whatever is authorized by its terms: (5 Wall. 72 U. S. 470).

Applying still another principle of the same case (*ante*, page 435), the Chief Justice proceeded to lay down the obvious conclusion—

But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade, Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress, with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted

to the legislature. The power to authorize a business within a State, is plainly repugnant to the exclusive power of the State over the same subject.

It is true that the power of Congress to tax, is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.

But it reaches only existing subjects. Congress cannot authorize a trade or business within a State, in order to tax it.

The granting of a license, [of this kind] therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing, except that the licensee shall be subject to no penalties under national law, if he pays it: (5 Wall. 72 U. S. 470, 471).

Calling attention to the careful limitations against legalizing what had been forbidden by State laws, the Chief Justice considered that the two lines of legislation, State and Congressional, proceeded to the same result, and, therefore no public morality or policy could be violated in convicting the defendant for not paying a license fee or tax for that business which it was a crime to pursue.

The second and succeeding cases were suits in the United States District Court for New Jersey, for the penalty incurred by selling lottery tickets, without a license. The Court gave judgment for the defendants, because the laws of New Jersey made such sale a criminal offense. These judgments were affirmed in the Circuit Court by Justice GRIER, but reversed without his dissent, by the Supreme Court, upon the principles already stated.

Pervear v. Mass. (1867), 5 Wall. (72 U. S.) 475, arose from the indictment of Pervear, in the State Court of Massachusetts, for keeping an illegal drinking place. His defense was based upon his supposed right to sell (1) from having procured the liquor seller's license, required by the Internal Revenue law, and (2) from having paid the tax on the liquor sold, as required by the same law. Upon the first point the Act of 1862 provided—

SEC. 64. 4. Retail dealers in liquors, including distilled spirits, fermented liquors, and wines of every description, shall pay twenty dollars for each license.

The Acts of March 3, 1863 (12 Stat. at Large, 716); June 30, 1864, (13 Id. 252); July 13, 1866 (14 Id. 116), contained similar provisions. And the decision of the Supreme Court of the United States was the same as in the lottery cases just considered.

The second point was said by Chief Justice CHASE, in delivering the opinion of the Court, to be nothing more than a different form of the first, and not supported by the decision in *Brown v. Md.* (*ante*, page 439), because that case did not establish the right to sell a package upon which a tax had been paid to the United States, but merely imported packages in the hands of the importers; and this, because the general power of the United States to tax, was admittedly a power concurrent with the State power of taxation.

A shadow of an argument appeared in the fact that the sales of the liquor had been in the original packages upon which the internal revenue tax had been paid. But it has already appeared (*supra*, page 443), that the term, original package, could not be so used unless there had been an import and the importer was offering for sale the import without having mingled it with other property taxable by the State, *e. g.* by breaking up the original package: *Waring v. The Mayor* (1869), 8 Wall. (75 U. S.) 110. Here Pervear was not an importer and did not aver that his liquor had been imported even from another State. Hence the liquor, in contemplation of law, in this appeal from the highest Court of Massachusetts, was either home-made or in second hands, and was therefore subject to the State law, as decided in the *License Cases* (*supra*, pages 453, 457).

There was also an attempt to defend against the State law as imposing excessive penalties, but it came to nothing because the Eighth Amendment does not apply to State legislation, but is a restriction upon the power of Congress. For this, the case is often cited.

Seven cases were also removed from the Supreme Court of Iowa, by the various defendants who had been convicted, under the State law (§2359, McClain's Ann. Code, 1888), of

keeping a place for the sale of intoxicating liquors: *The State v. Carney* (1865), 20 Iowa 82, where the opinion of the State Supreme Court was squarely placed by Judge DILLON upon section sixty-seven of the Revenue Act: (*ante*, page 723). The defendants contended, in the Supreme Court of the United States, that their licenses gave the right to sell; and this was denied for the same reasons as those used in the lottery cases, *supra*. These liquor licenses had been obtained under the same Act of 1862, as in *Pervear v. Mass.*, *supra*.

This exclusiveness of the State authority has been recognized as the important feature in these decisions, by Justice MILLER, in the *Slaughter House Cases* (1873), 16 Wall. (83 U. S.) 36, 64; Justice FIELD, in *U. S. v. 43 Gals. Whiskey* (1883), 108 U. S. 491; Justice HARLAN, in *Mugler v. Kansas* (1887), 123 Id. 623, 646; Justice LAMAR, in *Kidd v. Pearson* (1888), 128 Id. 1, 24; Justice WOODS, in *Presser v. Illinois* (1886), 116 Id. 252, 268.

The *License Tax Cases* also developed that the possession of a license did not assure immunity from further regulation. This subject is much wider than a division of interstate commerce, as it extends (*e. g.*) into that portion of the domain of foreign corporation law which lies beyond the Constitutional protection of the obligation of contracts: *Home Ins. Co. v. City Council* (1876), 3 Otto (93 U. S.) 116, 122; as well as into all those questions of contract which are within this Constitutional protection of contracts: *Royall v. Va.* (1886), 116 U. S. 572, 580, 583.

XIV.

Imports and exports are terms applicable to merchandise in trade with foreign nations, and not among the States of the Union.

Goods brought from another State may be taxed, after their arrival and while in their original packages, because not imports; but there must be no injurious discrimination in the tax in favor of home-made articles.

A State may not tax interstate commerce or goods coming from other States because of their origin.

A State may not lay a stamp tax on bills of lading issued either for exports or merchandisc consigned to a place in another State.

Woodruff v. Parham (1869), 8 Wall. (75 U. S.) 123, was an action of trespass begun in the State Circuit Court of Mobile, Alabama, by Woodruff & Parker, auctioneers and commission merchants, of Mobile, against Parham, the tax collector of that City, for damages suffered by the seizure of their merchandise for the non-payment of the City tax of fifty cents on the hundred dollars in value of their gross sales of merchandise in the original packages in which they came from other States for this purpose. The payment of the tax was resisted as inconsistent with Section Ten of the First Article of the Constitution (*supra*, page 425). Judgment being rendered against the plaintiffs, they removed the case to the State Supreme Court, where it was affirmed June 5, 1867, on the authority of their decision in *Hinson v. Lott* (*infra*, page 735), on an opinion by Chief Justice WALKER, 41 Ala. 334, 337.

The Alabama Court proceeded upon two grounds: *first*, that the States had concurrent power over commercial subjects until Congress positively acted, notwithstanding the principles of *Cooley v. Port Wardens* (*supra*, page 466), out of which has grown the present rule, that the State cannot legislate at all upon subjects admitting of uniform regulation, as to which the non-action of Congress is significant of an intention to permit entire freedom: *supra*, pages 420, 445, 448, 453.

Second, the Alabama Court followed Justices McLEAN, CATRON, DANIEL and WOODBURY, in the *License Cases* (5 How. 46 U. S. 594, 611, 614, 623), and declared the Constitutional meaning of an import was something introduced from a foreign country and not from a neighboring State. This construction involved a consideration of the opinion in *Almy v. State of California* (1861), 24 How. (65 U. S.) 169,

where Chief Justice TANEY, with the assent of Justices McLEAN, WAYNE, CATRON, NELSON, GRIER, CAMPBELL and CLIFFORD, declared the State law void for imposing a stamp tax upon bills of lading for gold and silver transported "from any point or place in this State, to any point or place without the limits of this State : " Act of April 26, 1858, Statutes of 1858, page 305. *Brown v. Maryland* (*supra*, page 439) was unqualifiedly followed, though the gold was consigned to New York City and not to a foreign port, and the Alabama Chief Justice was disingenuous enough to say—

The statement of the facts of the case is very meagre, and found only in the opinion of the Court. From that statement, it cannot be ascertained that the gold was not shipped [*sic*!] to New York, in *transitu* for some foreign port. From some expressions in the argument of the Court, we infer that such was the case: (40 Ala. 134).

An examination of the printed record discloses nothing to support this inference. On the contrary, the indictment in the Court of Sessions of the City and County of San Francisco, charged that—

John C. Almy, Jr., is accused by the Grand Jury of the City and County of San Francisco, State of California, by this indictment, found this twentieth day of August, A. D., 1858, of the crime of misdemeanor, committed as follows:

The said John C. Almy, Jr., * * * * being the master of said ship, as aforesaid, * * * made and executed, upon a piece of paper, a written and printed contract with the said Peter Prest, for the transportation and conveyance of the said gold dust of the value aforesaid, from the port of San Francisco aforesaid, to the port of New York aforesaid, a point outside of the limits of the State of California aforesaid, for and in consideration of one per cent. upon said gold dust, to be paid as freight by the said Peter Prest, his order or assign, on delivery of said gold dust at the Port of New York aforesaid.

Upon a re-argument, the Chief Justice admitted his error, after examining the printed transcript; but he then took the position that the question of export to another State had been passed without notice, and, as decided, was in conflict with the opinions in the *License Cases*: (40 Ala. 138, 141).

When these Alabama cases reached the Supreme Court of the United States, Justice MILLER, in writing the opinion, adopted this last view of Chief Justice WALKER, to the ex-

tent that the Court had overlooked the interstate feature of the bill of lading, and distinguished the precedent of that opinion by saying that it was well decided as the law conflicted with the Constitutional freedom of interstate commerce, within the rule laid down in *Crandall v. Nevada*, *supra*, page 464 ; STRONG, J., in *Case of the State Freight Tax* (1873), 15 Wall. (82 U. S.) 232, 280; BLATCHFORD, J., in *Pickard v. Pullman S. C. Co.* (1886), 117 U. S. 34, 48. Still, the stamp required by this California law was said to be an export tax, by Justice BRADLEY, in *Pace v. Burgess* (1876), 2 Otto (92 U. S.) 372, 376; and by Justice MILLER himself, in the *Trade Mark Cases* (1879), 10 Otto (100 U. S.) 82, 95.

As a consequence of these views, the Supreme Court of the United States unanimously upheld this tax as one imposed on all sales of merchandise without regard to the State where the seller resided or whence the goods had been shipped, so long as no injurious discrimination ensued.

As already noticed (*supra*, page 440), there has been supposed to be a conflict between the principles of *Brown v. Maryland* and *Woodruff v. Parham*, notwithstanding the declaration of Justice MILLER, that the authority of *Brown v. Maryland*, was not to be questioned nor its principles departed from in this decision. The cause of this supposition may be inferred from the actual point decided in *Woodruff v. Parham*, as just mentioned in the last paragraph. The consequences of this principle will be considered later, in order to observe that the decision thus reached, depended upon confining the terms, *imports* and *exports*, to commerce with other nations, and to this extent overruling *Almy v. California*.

The authority of *Brown v. Maryland*, therefore, seems to have been unqualifiedly admitted in connection with the commerce power, but not with that over imports and exports; for Justice MILLER used this language:—

The case of *Brown v. Maryland*, as we have already said, arose out of a statute of that State, taxing by way of discrimination, importers who

sold by wholesale foreign goods. Chief Justice MARSHALL in delivering the opinion of the Court, distinctly bases the invalidity of the statute, (1) On the clause of the Constitution which forbids a State to levy imposts or duties upon imports; and (2) That which confers on Congress the power to regulate commerce with foreign nations, among the States, and with the Indian tribes. The casual remark, therefore, made at the close of the opinion, "That we suppose the principles laid down in this case to apply equally to importations from a sister State," can only be received as an intimation of what they might decide if the case ever came before them, for no such case was then to be decided. It is not, therefore, a judicial decision of the question even if the remark was intended to apply to the first ground on which that decision was placed.

If the Court then meant to say that a tax levied upon goods from a sister State, which was not levied on goods of a similar character produced within the State, would be in conflict with the clause of the Constitution giving Congress the right "to regulate commerce among the States," as much as the tax on foreign goods, then under consideration, was in conflict with the authority "to regulate commerce with foreign nations," we agree to the proposition: (8 Wall. 75 U. S. 139).

The sentence here quoted in MARSHALL'S words, had been objected to by Chief Justice TANEY and Justice MCLEAN, in the *License Cases* (1847), 5 How. (46 U. S.) 578, 594; and has nearly always been treated, as here, by Justice MILLER, though without his vital distinction that the fault lay in applying it to impost taxes, when it should be confined to regulations of interstate commerce. Justice GRAY, (*supra*, page 521), is the last one to fail to observe this distinction.

This exclusion in *Woodruff v. Parham*, of the Constitutional power over exports and imports, in the case of articles carried from one State to another was immediately recognized by Justice MILLER himself: *Hinson v. Lott* (1869), 8 Wall. (75 U. S.) 148, 150; and afterwards by Justice CLIFFORD, in *Ward v. Maryland* (1871), 12 Wall. (79 U. S.) 418, 429; Justice STRONG, in *State Tax on Railway Gross Receipts* (1873), 15 Wall. (82 U. S.) 284, 296-7; Chief Justice CHASE, in *Osborne v. Mobile* (1873), 16 Wall. (83 U. S.) 479, 482; Justice HARLAN, in *Guy v. Baltimore* (1880), 100 U. S. 434, 437; and Justice BRADLEY, in *Coe v. Errol* (1886), 116 Id. 517, 526; and *Brown v. Houston*, where the decision was such a direct affirmance of *Woodruff*

v. *Parham* on this definition of imports and exports, that this is the proper place for its consideration.

Brown v. Houston (1885), 114 U. S. 622, was a case which originated in a petition by S. S. Brown and J. W. Schoenmaker, of Pittsburg, Pennsylvania, trading as "W. H. Brown," praying the Judges of the Civil District Court for the Parish of Orleans, Louisiana, December 30, 1880, to enjoin J. D. Houston, a State tax collector, from seizing and selling for non-payment of certain taxes, a lot of Pittsburg coal, then in New Orleans, in the hands of the agents of the plaintiffs for sale, and still on board the barges in which it had been transported from Pittsburg. The tax sought to be enjoined had been assessed under an Act of April 9, 1880 (Laws, pages 88-103), for levying taxes on all property in the State, and the coal assessed was afterwards sold to foreign steamships and planters by the boatload. The taxes were alleged to be illegal, because the coal remained in the original packages, as the wine did in *Low v. Austin* (*supra*, page 443); but with the difference of domestic, instead of foreign, origin, as in the latter case. Attention is drawn to this point, because there have been those who thought the decision in *Brown v. Houston* to have been overruled in the *Original Package Case*, *supra*, page 491.

The injunction was dissolved, February 12, 1881, and this decree was affirmed on appeal, by the State Supreme Court, May 16, 1881: (33 La. Ann. 843). The case was then removed to the Supreme Court of the United States, and again affirmed, upon the same points of law: *first*, that the coal was not an import, with an express affirmance of *Woodruff v. Parham*; *second*, that a subsequent sale for foreign use by one who did not allege himself to be an exporter, but simply a seller to any buyer, did not establish a case for immunity from State taxation. This point was more emphatically decided in *Coe v. Errol* (1886), 116 U. S. 517 (and *infra*). *Third*, that the restriction of the terms *imports* and *exports* to trade with foreign nations, does not operate so as to allow the States of the Union to infringe upon the Constitutional power to regulate commerce among

the States. In explaining this point, there was an unqualified affirmance of the rule formulated in *Cooley v. Port Wardens* (*ante*, page 466), and applied by Justice FIELD in *Welton v. Missouri* (1876), 1 Otto (91 U. S.) 275, 282, to secure the freedom of interstate commerce in the event of the inaction of Congress upon matters of national character and admitting of one uniform regulation. Of necessity, therefore, this tax upon Brown's coal was held not to be a tax imposed upon a foreign product, or an original package, or merchandise in transit, but upon property which was taxed no more and not otherwise than other property in the State: Per BRADLEY, J., in *Coe v. Errol* (1886), 116 U. S. 517, 527, and in *Robbins v. Taxing Dist.* (1887), 120 Id. 489, 497.

Read in connection with the other cases cited in this section, there is no conflict between *Brown v. Houston* and the *Original Package Case* (*supra*, page 491). The difficulty arose from Justice BRADLEY failing to stop there. Evidently with MARSHALL'S statement (*supra*, page 443) in mind, but without sufficiently regarding the previous caution in the same case (*supra*, page 442), and perhaps hurriedly assuming a general professional knowledge of the principles of the various *Passenger Cases* (*supra*, pages 459, 462) and overlooking a traditional denial of those cases by those who seek a correct exposition of Constitutional law in the various opinions delivered in the *License Cases* (*supra*, pages 453-9), Justice BRADLEY thought the tax to be valid, because—

The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year, or two years, or only for a day. It had become a part of the general mass of property in the State, and as such, it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana. It was treated in exactly the same manner as such goods were treated: (114 U. S. 632-3).

That is, there was no attempt to destroy the coal, or confiscate it, or condemn it as a menace to the citizens of the

State, or as a commodity offensive to the policy of the State ; for—

The taxing of goods, coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed: *BRADLEY*, J. 114 U. S. 633.

Of course, it was carelessness to use the word *imports* in this last extract, when the early part of the same opinion had denied to such goods that term.

The equal rights clause was also invoked, but its application was emphatically denied.

There was an affirmance of State laws which do not lay a discriminating tax on articles from other States, by Justice FIELD, in *Downham et al. v. City Council of Alexandria* (1870), 10 Wall. (77 U. S.) 173; and Chief Justice CHASE, in *Osborne v. Mobile* (1873), 16 Wall. (83 U. S.) 479; but of this last case, Justice BRADLEY subsequently remarked:—

The State Court relies upon the case of *Osborne v. Mobile*, which brought up for consideration, an ordinance of the City, requiring every express company, or railroad company doing business in that City, and having a business extending beyond the limits of the State, to pay an annual license of five hundred dollars; if the business was confined within the limits of the State, the license fee was only one hundred dollars; if confined within the City, it was fifty dollars; subject in each case to a penalty for neglect or refusal to pay the charge. This Court held that the ordinance was not unconstitutional. This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States: *Leloup v. Port of Mobile* (1888), 127 U. S. 640, 647.

Naturally, Chief Justice WAITE, dissenting in *Robbins v. Taxing District* (1887), 120 U. S. 489, 500, cited the Osborne case on the subject of discrimination; which was a correct use of this opinion, as pointed out by Justice BLATCHFORD, in *Pickard v. Pullman S. C. Co.* (1886), 117 U. S. 34, 50, though without there affirming or denying its validity.

As Justice MILLER affirmed *Leloup v. Port of Mobile*, in the unanimous opinion of the Court in *Western Union Tele-*

graph Co. v. Alabama (1889), 132 U. S. 472, 477; and Chief Justice FULLER, in the opinion for himself and Justices MILLER, FIELD, BRADLEY, BLATCHFORD and LAMAR, in *Lyng v. Michigan* (1890), 135 U. S. 161, 166, against Justices HARLAN, GRAY and BREWER, dissenting on the same grounds as in *Leisy v. Hardin* (*ante*, pages 513-43); the exact result of *Woodruff v. Parham*, on the validity of State tax laws which do not discriminate against merchandise on account of the place of its origin, is, that such tax laws are strictly confined to the raising of revenue outside of the instruments of interstate commerce.

XV.

Liquor brought from another State may be taxed without discrimination, while in the original packages.

It is discrimination to tax drummers or resident agents, selling liquor brought from another State, at a higher rate than domestic sellers.

Another Alabama Case reached the Supreme Court of the United States and was decided at the same time as *Woodruff v. Parham* (*supra*, page 728), it is here separately considered that a number of cases arising out of traffic in liquors may be grouped together. In this Alabama case, John W Hinson filed a bill in chancery at Mobile against Lott, as State and County tax collector, to restrain him, amongst other things, from levying upon certain liquor brought from Ohio for sale in Mobile, for a tax of fifty cents per gallon, claimed under the State Act of February 22, 1866 (§ 13, Acts, pages 15-6). The Chancellor dismissed the bill, and, as to this point, was affirmed by the State Supreme Court, June 6, 1867 (40 Ala. 123), and by the United States Supreme Court, November 8, 1869 (*Hinson v. Lott*, 8 Wall. 75 U. S. 148), on an opinion by Justice MILLER, assented to by Chief Justice CHASE and Justices GRIER, CLIFFORD, SWAYNE, DAVID DAVIS, FIELD, BRADLEY, and STRONG. Justice NELSON dissented as he thought this case governed by *Almy v. California* (*supra*, page 728), as well as by the

principle contained in Marshall's much criticised sentence, quoted by Justice MILLER in *Woodruff v. Parham* (*supra*, page 731), concluding that—

It will be seen that the last clause of this article [*supra*, page 415], contains the doctrine of my brethren in the case before us. The people of one State have the right of egress and regress, to and from the other, for any purposes of trade and commerce, and the articles may be taxed by the State into which they are carried; but there must be no discrimination. We have gone back to the Articles of Confederation, and have incorporated into the Constitution by construction, a provision which the framers of that instrument had rejected as wholly inadequate for the protection of interstate commerce. Instead, therefore, of adopting this article into that instrument, they adopted a more complete and thorough security to the enjoyment of the privileges of this commerce—"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports:" (8 Wall. 75 U. S. 144-5).

The allusions of Justice NELSON were to Justice MILLER's opinion for the majority of the Court, affirming that principle of *Coolcy v. Port Wardens* which denies a concurrent right in a State to regulate commerce until Congress should act: this principle was held to be inapplicable because another section of the Alabama Act appeared to impose a like tax on liquors manufactured in the State, and the thirteenth Section did not discriminate against the liquor brought from another State.

The Texas liquor case of *Tiernan v. Rinker* (1880), 12 Otto (102 U. S.) 123, began by the petition of B. & P. Tiernan and other liquor sellers to the District Court of Galveston County, Texas, May 31, 1876, praying for an injunction against the threatened collection by Selim Rinker as County Treasurer of an occupation tax laid by the County Court, under—

CHAPTER CXXI. An Act Regulating Taxation: (Approved June 3, 1873, Laws, page 198).

SEC. 3: That there shall be levied on and collected from every person, firm or association of persons, pursuing any of the following named occupations, an annual tax (except when herein otherwise provided) on every such occupation or separate establishment, as follows: For selling spirituous, vinous, malt and other intoxicating liquors, in quantities less than one quart, two hundred dollars; in quantities of a quart, and less than ten gallons, one hundred dollars; *provided*, that this section shall not be so construed as to include any wines or beer manufactured in this State,

or when sold by druggists for medicinal purposes; and *provided further*, that this section shall not be so construed as to authorize druggists to sell spirituous or intoxicating liquors, except alcohol. For selling in quantities of ten gallons and over, one hundred dollars. * * * *

SEC. 4. That the County Courts of the several counties of this State shall have the power of levying taxes equal to the one-half of the amount of State tax herein levied, except as hereinbefore provided: * * * *

The petitioners denied the Constitutionality of such a tax because it was in effect discriminative against wine or beer sold by them, because manufactured in other States. August 11, 1876, the Court sustained Rinker's demurrer; whereupon the plaintiffs appealed to the State Supreme Court and obtained a reversal, March 29, 1877, on an opinion by Associate Justice MOORE, based upon the principles of *Wellton v. Missouri*, (*infra*, page 751) though as to spirituous liquor there was no discrimination: *Higgins v. Rinker*, 47 Texas 381, 391, 393. Rinker then obtained a rehearing and an affirmance of the decree in his favor, July 11, 1877. This was upon an opinion by Chief Justice ROBERTS, who drew the distinction that the benefit of the *proviso* could only be obtained by selling the wine or beer manufactured in the State, in an establishment where no spirituous liquors were sold; the plaintiffs were selling spirituous liquors also, and therefore they could not complain of discrimination because they must pay the tax as sellers of spirituous liquors, the same as if they sold no wine or beer. Moreover—

If it be held that but one establishment was contemplated by the law, embracing the sale of either spirituous liquors, or wines, or beer, or all together, then the main object of the law will be defeated by its being contrary to the Constitution of the United States, and no revenue will be collected, and no encouragement will be given, either to the manufacture or the use of wines or beer, or both, in preference to the use of spirituous liquors: ROBERTS, C. J., *Higgins v. Rinker* (1877), 47 Texas 393, 401.

Both this opinion and the concurring one of Associate Justice GOULD, pointed out the divisibility of the Texas statute as the distinguishing feature of the case from *Wellton v. Missouri* (*infra*, page 751).

The Judgment was then removed to the Supreme Court of the United States, and there affirmed, November 15, 1880, upon the unanimous opinion of Justice FIELD, recog-

nizing and approving both the doctrine of *Wellton v. Missouri*, and the distinction drawn by the Texas Court: (12 Otto, 102 U. S. 127). The case is therefore chiefly valuable as an instance of exceedingly fair dealing with a State statute. The principle of yielding to the construction of the State Court was also followed in *Machine Co. v. Gage* (1880), 10 Otto (100 U. S.) 676, and (*infra*, page 753), though the true principle is to examine the obvious effect of the statute under consideration. This is the principle upon which all State laws, laying taxes upon persons, have been declared void: *supra*, page 441, and *infra*, page 755.

Another liquor case began in the Police Court of Grand Rapids, Michigan, June 19, 1883, by complaint against Samuel A. Walling, for selling at wholesale without paying the tax required by—

AN ACT to impose a tax on the business of selling spirituous and intoxicating, malt, brewed, and fermented liquors in the State of Michigan to be shipped from without this State: (Approved May 3, 1875, Laws, pages 271-2; Howell's Stat. § 1277).

SECTION 1. *The People of the State of Michigan enact*, That every person who shall come into, or being in this State, shall engage in the business of selling spirituous and intoxicating, malt, brewed, or fermented liquors to citizens or residents of this State, at wholesale, or soliciting or taking orders from citizens or residents of this State for any such liquors, to be shipped into this State, or furnished, or supplied at wholesale to any person within this State, by a person, co-partnership, association, or corporation, not resident in this State, nor having his, their, or its principal place of business within this State, shall, on or before the fourth Friday of June in each year, pay a tax of three hundred dollars if engaged in selling, or soliciting, or taking orders for the sale of such spirituous and intoxicating liquors, and one hundred dollars for malt, brewed, or fermented liquors. Such tax to be paid to the Auditor General, and be by him paid into the State treasury, to the credit of the general fund. [The remaining sections provide for exhibiting the tax receipt and for punishing violation of the law]

By Act of May 19, 1881 (Laws, pages 148-9); Howell's Stat. § 1281), in force at the time of Walling's arrest, resident liquor manufacturers and wholesale dealers were taxed two hundred dollars for sales of malt, brewed, or fermented liquors, and five hundred dollars for sales of spirituous or intoxicating liquors; so that the discrimination was in favor of dealers in other States, but was strongly against drum-

mers from other States, as agents of resident dealers paid in tax at all.

Walling was convicted and fined by the Police Judge: and, on appeal, in the Circuit Court of Kent County, the Judge (Hon. ROBERT M. MONTGOMERY), charging the jury that as the statute had not been passed upon by the State Supreme Court, he would treat it as valid. This conviction was affirmed, April 9, 1884, by the State Supreme Court, on an opinion by SHERWOOD, J., with the concurrence of THOMAS M. COOLEY, C. J., and CAMPBELL, and CHAMPLIN, A. JJ.: *The People v. Walling*, 53 Mich. 264.

The defences set up were all relative to the Constitutionality of the Act: *first*, that it was contrary to the State Constitution, which was denied by Judge SHERWOOD; *second*, that it was contrary to the commerce, equal rights, and imports clauses of the Constitution of the United States. On this second point, of course the *License Cases* and *Woodruff v. Parham* were considered sufficient authority.

The case was then removed to the Supreme Court of the United States, where the judgment was reversed (January 18, 1886; 116 U. S. 446), on an opinion by Justice BRADLEY, with the concurrence of all the Justices, except Chief Justice WAITE (who did not sit), because the State law imposed a tax discriminating against persons selling goods to be brought from another State; this was expressly upon the authority of *Welton v. Missouri* (*infra*, page 751), and *Brown v. Houston* (*supra*, page 732): and as to the exclusiveness of the Constitutional power over interstate commerce, upon the concurring opinion of Justice JOHNSON in *Gibbons v. Ogden*.

The latest of the liquor cases also arose in the State of Michigan, in the State Circuit Court for Iron County, in the prosecution of Henry Lyng, as agent of a Wisconsin firm, for selling lager beer at wholesale, in the original packages in which it had been shipped, and without having complied with—

AN ACT to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving, or deliver-

ing spirituous and intoxicating liquors, and malt, brewed, or fermented liquors and vinous liquors in this State, and to repeal all acts or parts inconsistent with the provisions of this Act. Approved, June 28, 1887: Public acts, 446-60.

SECTION 1. *The People of the State of Michigan enact*, That in all townships, cities and villages of this State, there shall be paid annually, the following tax upon the business of manufacturing, selling or keeping for sale, by all persons whose business, in whole or in part, consists in selling, or keeping for sale, or manufacturing, distilled, or brewed, or malt liquors, or mixed liquors as follows: * * * * Upon the business of selling only brewed or malt liquors, at wholesale or retail, or at wholesale and retail, three hundred dollars per annum; upon the business of selling spirituous or intoxicating liquors at wholesale, five hundred dollars; or at wholesale and retail, eight hundred dollars per annum; upon the business of manufacturing brewed or malt liquors for sale, sixty-five dollars per annum; upon the business of manufacturing for sale spirituous or intoxicating liquors, eight hundred dollars per annum. No person paying a tax on spirituous or intoxicating liquors under this act shall be liable to pay any tax on the sale of malt, brewed, or fermented liquors. No person paying a manufacturer's tax on brewed or malt liquors under this act, shall be liable to pay a wholesale dealer's tax on the same.

Having been convicted, Lyng removed the case to the State Supreme Court, where the judgment was directed to be entered against him (April 19, 1889), on an opinion by LONG, J., in which there was *first*, a denial of any discrimination such as in *Walling v. Michigan* (*supra*, page 738), because the liquor might have been manufactured within the State, and *second*, a repetition of the legal heresy that delivery to the consignee terminated interstate commerce. The Supreme Court of the United States, on removal to that Court, again denied the principles upon which the Michigan Court proceeded: *Lyng v. Michigan* (1890), 135 U. S. 161, Chief Justice FULLER pointing out that the manufacturer in another State was required by this unconstitutional law, to pay three hundred dollars, while the Michigan brewer only sixty-five dollars. Justices HARLAN, GRAY and BREWER dissented upon the grounds stated in their dissent in (*Leisy v. Hardin*, *ante*, pages 513-44).

The effect of *Hinson v. Lott* and *Woodruff v. Parham*, in allowing a State to tax, so long as no discrimination was practiced against the products of other States, appeared in a

number of State laws ingeniously contrived for the purpose of going at least up to this boundary line. In addition to the laws designed to have a general effect (*supra*, pages 727-8), and those relating to the liquor traffic, just treated of, there was another important class intended to restrain traveling salesmen. Such laws are considered together, under the case of *Ward v. Maryland*, *infra*, page 748.

XVI.

Congress can not exercise police powers within a State : though a State can not, by its police power, prevent interstate commerce.

The Supreme Court of the United States will uphold State police regulations, when enacted in good faith and appropriate to the protection of life, liberty and property.

A provision in an internal revenue act, fixing the flashing point of illuminating oil, is of no effect in a State.

A patent for illuminating oil, is no defense for violating a State regulation forbidding the sale of such oil.

The United States v. DeWitt (1870), 9 Wall. (76 U. S.) 41, under another section of the Internal Revenue Act, also raised the question of the exclusiveness of State authority in local affairs. DeWitt was indicted in the United States District Court for the Eastern District of Michigan, under Section twenty-nine of the Act of March 2, 1867 (14 Stat. at Large 484), amending the Internal Revenue laws, by making a misdemeanor the sale of illuminating petroleum oil which was inflammable at less than 110° Fahrenheit. To this indictment a demurrer was interposed, that this section was not a valid and Constitutional law, and Justice SWAYNE and the District Judge WILKINS differing, June 6, 1868, the case was certified to the Supreme Court, where the Attorney General argued in support of the law, that it was for taxation merely, thus conceding the power of the State over police regulations. But Chief Justice CHASE thought this section a police regulation and consequently not valid within the

territory or a State, citing the *License Cases*, the *Passenger Cases* and the *License Tax Cases*, *supra*, pages 453, 460, 722.

That such matters lay exclusively within the police power of the States, was distinctly affirmed on the authority of *U. S. v. DeWitt*, in *Patterson v. Kentucky* (1879), 7 Otto (97 U. S.) 501, where Patterson had been indicted, December 11, 1874, in the Paducah City Court, for selling Aurora Oil after it had been condemned by the State inspector as unsafe for illuminating purposes, under the Kentucky act of February 21, 1874. This oil had been patented by the defendant and the patent was set up as a defense, so as to raise a conflict between the United States Patent laws and the State act.

Upon appeal, the judgment was affirmed by the Court of Appeals, September 22, 1875, quoting the decision of KENT, in one of the cases arising out of the steamboat monopoly of Livingston and Fulton (*supra*, page 429), and *U. S. v. DeWitt*, just considered, and concluding:—

The right of a State to protect its citizens from the danger attending the use of such fluids, although patented, is not inconsistent with any patent regulation, nor in violation of the Federal Constitution: (11 Bush, Ky., 311, 316).

The case was then removed to the Supreme Court of the United States, where the judgment was again affirmed, Justice HARLAN delivering the unanimous opinion of the Court that the Kentucky statute was a police regulation against which the patent laws of the United States conferred no immunity, because—

The right to sell the Aurora Oil was not derived from the patent; that right existed before the patent, and unless prohibited by valid local laws, could have been exercised without the grant of letters patent. The right which the patent primarily secures, is the exclusive right in the discovery, which is an incorporeal right, or, in the language of Lord MANSFIELD, in *Millar v. Taylor* (1769), 4 Burr. 2303, "a property in notion," which "has no corporeal tangible substance." The enjoyment of that incorporeal right may be secured and protected by national authority, against all hostile State legislation; but the tangible property which comes into existence by the application of the discovery is not beyond the control, as to its use, of State legislation, simply because the inventor acquires a monopoly in the discovery: (7 Otto 97 U. S. 506.)

This decision that the patent laws did not prevent State laws from requiring a license for the sale of the patent article, or other regulation, was followed in *Webber v. Virginia* (1881), 13 Otto (103 U. S.) 344; but the ingenuity of State evasion required that it should be allowed no further effect. For, in *Minnesota v. Barber* (1890), 136 U. S. 313, the Court was asked to recognize the police power of the State, not only over degrees of fire test for illuminating oil, but also over the time between killing and offering meat for sale. Justice HARLAN replied, that—

There is no real analogy between that case and the one before us. The Kentucky Statute prescribed no test of inspection, which, in the nature of the property, was either unusual or unreasonable, or which, by its necessary operation, discriminated against any particular oil because of the locality of its production. * * * *

But a law providing for the inspection of animals whose meats are designed for human food, cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State, of sound meats, the product of animals slaughtered in other States: (136 U. S. 327, 328).

XVII.

The Constitutional power to regulate commerce extends over that commerce which, though carried on within a State, is a part of interstate or foreign commerce.

Navigable waters of the United States are those used as a part of the means for interstate and foreign commerce.

A steamboat navigating only within a State, must have the United States license, if she carries freight and passengers ultimately destined to another State or a foreign nation.

Trans-shipment of freight destined to another State or nation, does not so break up the carriage as to remove it from the Constitutional power into the domain of the State's police power.

The Constitutional power cannot be defeated by the number of separate carriers, or similar details.

The case of *The Daniel Ball* lies within the purview of this article because it called for an examination of the Constitutional power over commerce within a State. Had the views of Justice WOODBURY (*ante*, page 462) prevailed, it would have been enough to say that the principle upon which they rested would have authoritatively settled this case the other way from the final judgment of the Supreme Court of the United States.

The case began by an information filed in the United States District Court for the Western District of Michigan, April 2, 1868, against the steamboat *Daniel Ball*, for navigating the Grand River, in that State, with merchandise and passengers, but without the United States license required by—

CHAP. CXCI. *An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam.* Approved July 7, 1838; 5 Stat. at Large 304.

SEC. 2. *And be it further enacted*, That it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any goods, wares, and merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, from and after the said first day of October, one thousand, eight hundred and thirty-eight; without having first obtained, from the proper officer, a license under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States, the sum of five hundred dollars, one-half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged, shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States having jurisdiction of the offense.

This statute was repealed by the Act of February 28, 1871, which substituted the description of waters:—

SEC. 41. *And be it further enacted*, That all steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce, or open to general or competitive navigation, shall be subject to the provisions of this Act: *Provided*, That this act shall not apply to public vessels of the United States, or vessels of other countries, nor to boats, propelled in whole, or in part, by steam, for navigating canals: (16 Stat. at Large 453).

In the Revised Statutes, this language was simplified into—

SEC. 4400. All steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this Title.

The defense offered was that the steamer was so constructed as to be incapable of navigating the waters of Lake Michigan, into which the river emptied; that her passengers and cargo, when destined to other States, were delivered to forwarding agents at Grand Haven, and by them sent on to their destination; and that, consequently, the steamer was engaged in domestic State commerce only, and not in the navigation subject to the laws of the United States.

The United States District Judge (SOLOMON L. WITHEY) dismissed the libel, July 28, 1868, (1 Brown 202) in order to secure uniformity of decision in the two Districts of the State, and not because he agreed with the reasoning which made trans-shipment a determining fact against the very purpose of that change of carriers. The case was then removed to the Circuit Court where (November 6, 1868) the decree was reversed, the libel sustained and the penalty decreed, the Court being composed of Justice SWAYNE and the District Judge. On appeal to the Supreme Court, the reasoning of the District Judge and the decree of the Circuit Court were affirmed upon a unanimous opinion by Justice FIELD (January 23, 1871; 10 Wall. 77 U. S. 557), upon two grounds: *first*, that the River was a navigable water of the United States, in contradistinction to the navigable waters of a State, because it formed, *in its ordinary condition*, and in connection with other waters, a continuous highway over which commerce might be, and was, carried on with other States or foreign countries, in the customary modes. The words printed in italics serve to distinguish this case from *Veazie v. Moor* (1852), 14 How. (55 U. S.) 568, 574 (*infra*, page 823), and *Esplanade Co. v. Chicago* (1883), 107 U. S. 678, 682, which were in fact but applica-

tions of the principles of *Willson v. The Marsh Co. supra*, pages 445, 482 : as well as to prevent a misapprehension, from the citation by Justice FIELD, of *The Genessee Chief* (1851), 12 How. (53 U. S.) 443, and *Hine v. Trevor* (1867), 4 Wall. (71 U. S.) 555, which involved the general doctrine of navigability in America. That question is at rest : *Ex parte Boyer* (1884), 109 U. S. 629 ; *The Eagle* (1869), 8 Wall. (75 U. S.) 15 ; *The Montello* (1871), 11 Wall. (78 U. S.) 411, and (1874), 20 Wall. (87 U. S.) 430, where the principles of the opinion in the case of the *Daniel Ball*, were applied to the Fox River, Wisconsin, notwithstanding portages around obstructions. Moreover, both the subject and limits of this article forbid even a fuller discussion of the difference between waters not subject to Congressional regulation and those like the Grand River, just as when discussing the bridge cases (*ante*, pages 480-1), the power to bridge was considered only in connection with interstate and foreign commerce.

The *second* ground for the opinion of Justice FIELD was the destination of the steamer's merchandise and passengers, notwithstanding the fact that the steamer was not run in connection with any other carrier : that is—

Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress : FIELD, J., *The Daniel Ball* (1871), 10 Wall. (77 U. S.) 557, 565.

This statement was avowedly founded on MARSHALL'S definition of the force of "Among" (*supra*, page 435) and the possibility of defeating the Congressional power by the simple expedient of combining different carriers, each taking up the transportation at the boundary line of the adjoining States. The propriety of avoiding this possibility, which might arise through change of carriers, or other accidents or conveniences of commerce, was repeated by the same justice in the Brooklyn Bridge case of *Miller v. Mayor of New*

York (1883), 109 U. S. 385, 395, and had one of its most salutary applications in the case of *Heck & Petree v. East Tenn., Vir. & Ga. RR. Co.* decided by the Interstate Commerce Commission, on a report and opinion by Commissioner MORRISON, February 15, 1888 (3 Ann. Report 211; 27 AMER. LAW REGISTER 273). The complainants were refused transportation of their coal from their mines located on the Coal Creek & New River Railroad. This railroad was the only means for carrying the complainants' coal from their mines, and yet presumed to deny transportation upon the ground that it was a State corporation whose line was wholly within the State of Tennessee. But the opinion declared this railroad to be one of the instrumentalities of shipment or carriage included in the term "transportation," and the complainants therefore to be entitled to have their coal carried out on its way to market in another State. The actual cause of the refusal to carry the coal, was a disagreement amongst the stockholders, and on this account a Constitutional question was raised and decided for the benefit of the public.

The principle that the commencement of the movement of merchandise destined for another State or nation, is the period of time when the Congressional power attaches, was afterwards distinctly declared in *Coe v. Errol* (*infra*) as well as recognized in *Kidd v. Pearson* (1888), 128 U. S. 1, 25; to that portion of this article, reference may be made for further examination.

XVIII.

A State tax upon a drummer or person who sells by sample, catalogue or trade list, or upon one whose occupation consists in selling goods, is a tax upon the goods and not a mere license to carry on the avocation.

A non-resident cannot be required to pay a tax measured by his stock of goods in another State, or by his capacity to do business all over the United States and not merely within the taxing State.

A non-resident who opens a place of business and employs drummers in a State, cannot object to State taxes which are no greater than those imposed upon residents of the State: but there must be no discrimination.

Any tax or fee, imposed upon non-resident dealers or their salesmen, maintaining no place of business in the State, is a tax upon interstate commerce, and is void.

A State cannot require a non-resident drummer to pay a license fee for the privilege of selling.

A non-resident's exemption from State taxation is not a greater privilege than enjoyed by residents: the State has the power to tax residents, and in that way, the ability to prefer non-residents.

Commerce between a State and the District of Columbia cannot be restrained by municipal regulations in the District to any greater extent than commerce among the several States.

Congressional regulations of commerce must be general and not local.

The agent of a distant but interstate railroad may solicit passengers without paying a State license fee.

Commerce among the States includes commerce out of, as well as into a State.

A State may not tax commerce among other States.

The agents and other facilities selected by interstate carriers need not be essential to the conduct of their business in order to prevent State regulation or taxation.

In *Ward v. Maryland* (1871) 12 Wall. (79 U. S.) 418, the Grand Jury for the City of Baltimore, December 4, 1868, prosecuted Elias Ward, a non-resident, for offering to sell certain merchandise by sample, without the license required by Act of March 30, 1868, repealing certain Amendments of the Code and substituting the following section:—

37. No person, not being a permanent resident in this State, shall sell, offer for sale, or expose for sale, within the limits of the City of Baltimore, any goods, wares, or merchandise whatever, other than agricultural products, and articles manufactured in the State of Maryland, within the limits of the said City, either by card, sample, or other specimen, or by written or printed trade list or catalogue, whether such person be the maker or manufacturer thereof or not, without first obtaining a license so to do: [Chap. 413, Laws, pages 786-7: the other clauses merely enforcing the above.]

This license was double that required of a resident of the State.

Ward having admitted the facts, was adjudged guilty and fined. On appeal, this judgment was affirmed, the State Court denying that the law transgressed the commerce or equal rights clauses of the Constitution: *Ward v. The State* (1869), 31 Md. 279. That is, the State Court held the tax to be one on a person, and not on goods which were not even alleged to be in the original packages in which they had been brought into the State:—

There is nothing in this, or any other law of the State, which prohibits or restrains non-resident merchants, manufacturers, or traders, or other agents, from bringing their goods here, and selling them in the same mode and under the same license as residents of the State. A custom, however, has grown up in recent times with merchants and manufacturers, in the large manufacturing and commercial cities and States, of traveling or sending agents or runners through other States and cities, with samples, cards, catalogues, or trade-lists of their goods, and thereby selling by retail, or wholesale, large quantities of merchandise, located beyond the limits of the States, where they thus sell, and not subject to the local State, county, or municipal taxation, as are like goods in the hands of resident merchants, or traders, to the great detriment of the business and trade of the latter. Large sales are thus made, and an extensive and lucrative business is thus carried on, and it is the object of the law in question to search and subject to taxation, by means of a license, the trade and business thus transacted within the limits of the principal City of this State. It is, therefore, a tax upon a particular business or trade, carried on in a particular mode within the limits of the State, by a particular class of persons, and not a tax upon goods or merchandise imported into a State, either from foreign countries, or from States, and the question is as to the power of the State to impose such tax: MILLER, J., 31 Md., 285.

Appealing to the Supreme Court of the United States, Ward secured a reversal on the ground that the equal rights clause of the Constitution [Art. IV. Sec. 2], had been vio-

lated; the opinion was written by Justice CLIFFORD, with the assent of Chief Justice CHASE, and Justices NELSON, SWAYNE, DAVID DAVIS, STRONG, MILLER and FIELD. Justice BRADLEY went further and thought the commerce clause had been violated also, for—

Such a law would effectually prevent the manufacturers of the manufacturing States from selling their goods in other States, unless they established commercial houses therein, or sold to resident merchants who chose to send them orders. It is, in fact, a duty upon importation from one State to another, under the name of a tax: (12 Wall. 79 U. S. 432-3).

Without enforcing or repealing the law thus declared unconstitutional (BARTOL, C. J., 57 Md., 263), the Maryland legislature amended the sections of the Code applicable to resident traders, so that—

SEC. 41. No person or corporation, other than the grower, maker, or manufacturer, shall barter or sell, or otherwise dispose of, or shall offer for sale, any goods, chattels, wares or merchandise, within this State, without first obtaining a license in the manner herein prescribed: *provided*, persons carrying on the shad and herring fisheries in this State may sell and dispose of so much salt as may be necessary to cure the fish purchased of them during the months of March, April and May, and no longer, without license, and that nothing herein contained shall extend to vendors of cakes, or to the vendors of beer and cider, who are the makers of such beer and cider, but nothing herein shall exempt any vendors of lager beer, from the requirements to obtain a license to sell said lager beer: Chap. 349, Laws of 1880; still in force, Pub. Gen. L., 1888, Art. 56, § 35.

Under this Chapter, a New Yorker, George W. Corson, was indicted March 22, 1881, for selling tea by sample to a Baltimorean, and being convicted, appealed to the State Court of Appeals. That tribunal thought that Ward had escaped because the law (*supra*, page 749), had discriminated against a non-resident, but here, in Corson's case, the new law seemed impartial. Nor could the State Court appreciate the argument founded upon the amount of the license, fixed by—

SEC. 43. The applicant shall state to the clerk on oath, to be administered by the clerk, or if the applicant reside in a county, to be administered by the said clerk or any justice of the peace, the amount of said applicant's stock of goods, wares and merchandise generally kept on hand by him or the concern in which he is engaged, at the principal season of

sale; or if said applicant shall not have previously engaged in such trade or business, the amount of such stock he expects to keep as aforesaid: Chap. 414, § 3, Laws of 1858; still in force, Pub. Gen. L., 1888, Art. 56, § 37.

Corson contended that this Section operated to tax property out of the limits of the State; and although this was denied by Chief Judge BARTOL, in delivering the opinion (57 Md. 251, 266), which affirmed Corson's conviction (July 22, 1881), because the tax was not on goods but by a standard fixed by the value of the goods; yet this contention had great weight in the Supreme Court of the United States, where the case was removed and reversed, March 7, 1887. This case of *Corson v. Maryland* (120 U. S. 502), was heard, with *Robbins v. Taxing District* (*infra*, page 758), and the State law declared unconstitutional for the same reasons; but the dissenting Justices in the Robbins Case, here agreed to the judgment of reversal of the Maryland conviction, because the license required in that State was, in their opinion, measured by the capacity of the drummer's principal to do business all over the United States, and without reference to the amount done or to be done in Maryland: per WARRE, C. J., 120 U. S. 506.

Welton v. State of Missouri (1876), 1 Otto (91 U. S.) 275, was another license case which began by the indictment of M. M. Welton, April 13, 1872, in the State Circuit Court for the County of Henry, State of Missouri, for selling sewing machines manufactured in another State, without the license required by—

SECTION 1. Whoever shall deal in the selling of [patents, patent rights] patent or other medicines, [lightning rods] goods, wares or merchandise, except books, charts, maps and stationery, *which are not the growth, produce or manufacture of this State*, by going about from place to place to sell the same, is declared to be a peddler; Gen. Stat. 1865, chapter 96, page 417; Wagner's Stat. 979, as amended by Act of April 12, 1877, Laws, page 295, striking out the words *in italics* and inserting the bracketed words; Rev. Stat. 1879, §6471 and 1889, §7211.

SEC. 2. No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners, agents, or otherwise; and no peddler shall sell wines or spirituous liquors: *Id.* and Rev. Stat. 1879, §6471, and 1889, §7212.

Being convicted, notwithstanding the defence of the repugnancy of this State law to the Constitutional provisions, regulating commerce and forbidding inposts (*supra*, pages 420, 425), Welton removed the case to the State Supreme Court; where the judgment was affirmed, January 26, 1874, on an opinion in which *Ward v. Maryland*, (*supra*, page 748) was distinguished on the ground there and often supposed to prevent the law being obnoxious to the Constitutional provision: namely that the tax was on the person, and not on the goods.

The law in question [in the Maryland case], discriminated between citizens of Maryland and citizens of other States pursuing the same calling in Maryland, and levied a higher tax upon the nonresident peddler. But there is no such feature in our law. Whether the peddler comes from Maine or Louisiana, or has been born and lived here all his life, makes no difference in the tax he pays for a peddler's license: NAPTON, J., *State v. Welton* (1874), 55 Mo. 288, 291.

The judgment was then removed to the Supreme Court of the United States, and there reversed upon a unanimous opinion by Justice FIELD, on the ground of discrimination in the State statute against the growth, products and manufactures of another State, as no license was required for peddling such articles, if of Missouri origin; that is, following *Brown v. Maryland* (*supra*, page 439).

Where the business, or occupation, consists in the sale of goods, the license tax required for its pursuit, is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through a license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any less invalid because enforced through the form of a personal license: FIELD, J., *Welton v. Mo.* (1876), 1 Otto (91 U. S.) 275, 278.

Alluding to the exception of injurious discrimination, in *Woodruff v. Parham* (*supra*, pages 728, 730), and declaring that inaction by Congress is equivalent to a declaration of freedom, and quoting from *Brown v. Maryland*, the immunity there declared for original packages within the Constitutional meaning of this expression (*supra*, page 443), the opinion proceeded:—

Following the guarded language of the Court in that case [of *Brown v. Maryland*], we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application, to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The Act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment unconstitutional and void: FIELD, J., *Wellton v. Mo.* (1876), 1 Otto (91 U. S.) 275, 282.

Wellton v. Missouri was one of the decisions, which its writer afterwards supposed (in *Mugler v. Kansas*, 1887, 123 U. S. 623, 676) to be an abandonment of the Constitutional construction upon which the *License Cases* had been decided: this has already been alluded to and a quotation printed on page 459, *supra*. Here may be added that Justice BRADLEY had previously extracted the general principle of non-taxation of goods carried from State to State because of their origin (*Phila. & S. M. S. Co. v. Comm. Pa.*, 1887, 122 U. S. 326, 341), as well as potency of Congressional non-action (*Robbins v. Taxing Dist.*, 1887, 120 U. S. 489, 493; *Walling v. Mich.*, 1886, 116 Id. 446, 454; and *Brown v. Houston*, 1885, 114 Id. 622, 631); so also, Justice BLATCHFORD in *Pickard v. Pullman S. Car Co.*, (1886) 117 Id. 34, 49; Justice SWAYNE in *Machine Co. v. Gage* (1880), 10 Otto (100 U. S.) 676, 678; and Chief Justice WAITE in *Hall v. De Cuir* (1878), 5 Otto (95 U. S.) 485, 490; as had Justice MILLER, the principle against discrimination (*Wabash, St. L. & P. RR. Co. v. Ill.*, 1886, 118 U. S. 557, 574, 589; *Cook v. Pa.*, 1878, 7 Otto 97 U. S. 566, 573); so also Justice HARLAN in *Guy v. Baltimore*, (1880) 10 Otto (100 U. S.) 434, 439.

All of these principles depending upon the doctrine of *Cooley v. Port Wardens* (*supra*, page 466), as Justice FIELD said himself (*Mobile Co. v. Kimball*, 1881, 12 Otto 102 U. S. 691, 702), so that the *License Cases* would seem to have been in fact overruled within five years after their decision.

The *Howe Machine Co. v. Gage* (1880), 10 Otto (100 U.

S.) 676, originated before S. HEERMANS, Justice of the Peace of Sumner County, Tennessee, March 30, 1876, by the plaintiffs suing the County Clerk to recover fifteen dollars and costs paid him under protest for the privilege of peddling sewing machines in that County, under the provisions of the Code, Section 553, in subsection 43, now increased to twenty dollars by Section 618 of the Code of 1884. Peddlers of articles manufactured, or made up in the State and of scientific and religious books (Code of 1871, § 546), and all articles manufactured of the produce of the State (Act of March 24, 1875, Chap. 98, § 1) were at this exempt, in obedience to—

SEC. 30. No article manufactured of the produce of this State, shall be taxed otherwise than to pay inspection fees : Const. 1870, Art. II.

The judgment was rendered in favor of the Clerk, and the plaintiffs appealed to the State Circuit Court, where the judgment was affirmed, November 13, 1876, on an agreed statement of facts, that the plaintiffs manufactured their sewing machines in Connecticut, but had an office in Nashville, Tennessee, from whence the agent had traveled in a wagon, peddling the machines through the country districts. The plaintiffs then appealed to the State Supreme Court, where the judgment was again affirmed, March 2, 1877, upon an opinion distinguishing *Wellton v. Missouri* (*supra*, page 751), where the statute was aimed directly at the importation and peddling of merchandise ; for—

Our statute is comprehensive and applies to the resident as well as the nonresident—to home manufacturers as well as to the importer of foreign goods, or goods manufactured out of, and not of the growth or produce of the State ; it is not an attempt to lay imposts, or duties on imports or exports, but broadly levies a tax upon all peddlers of sewing machines without regard to place of growth, or produce of material, or of manufacture. Again, while our [State] Constitution ordains that no article manufactured of the produce of the State, shall be taxed otherwise than to pay inspection fees, it also ordains, as we have already noticed, that "the Legislature shall have power to tax merchants, peddlers, and privileges," etc. The two clauses must be construed *pari passu*, and effect given to each : *TURNER, J., Machine Co. v. Cage* [sic] (1877), 9 Baxter (Tenn.) 518, 521.

The plaintiffs then removed the judgment to the Supreme Court of the United States, where the judgment was again and finally affirmed, March 29, 1880, on a unanimous opinion by Justice SWAYNE, who professed to be bound by the construction put upon the State Constitution and laws by the State Court. For this, he cited *Leffingwell v. Warren* (1862), 2 Black (67 U. S.) 599.

The same principle of following the decisions of State Court, construing State Constitutions and laws, was observed in the Texas liquor cases (*supra*, page 736), and is therefore worthy of some examination here. The great number of cases in which the principle has been followed, forbids any complete mention of them, and perhaps the briefest practical method is to refer to a recent case where the principle was recognized and restrained thus :—

In the case of the petitioner brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question, whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal under the Constitution and laws of the State, is not open to us. And, although that question might have been considered in the Circuit Court, in the application made to it, and by this Court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the State court upon the points involved in that inquiry. That, however, does not preclude this Court from putting upon the ordinances of the supervisors of the County and City of San Francisco, an independent construction ; for the determination of the question whether the proceedings under these ordinances, and in the enforcement of them, are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and judge. We are consequently constrained, at the outset, to differ from the Supreme Court of California, upon the real meaning of the ordinances in question : MATTHEWS, J., *Yick Wo v. Hopkins*, Sheriff and *Wo Lee v. Same* (1886), 118 U. S. 356, 369-6.

That is, the Supreme Court of the United States is the interpreter of the Constitution, and in performing this duty is not hampered by State constructions of State laws : else the declared supremacy of the Constitution might be more threatening than real : (See above, page 425). For this reason *Yick Wo v. Hopkins*, as well as *Henderson v. The*

Mayor ; Walling v. Michigan (*supra*, pages 465, 738), and *RR. Co. v. Husen* (*infra*, page 801) were cited upon the paramount authority of the Constitution of the United States, over the police power of the States, by Justice HARLAN, in *Mugler v. Kansas* (1887) 123 U. S. 623, 663.

This case of *Machine Co. v. Gage*, did not receive much recognition, before the dissenting opinion of Justice GRAY (*ante*, page 536): for in *Walling v. Michigan* (1886), 116 U. S. 446, 461, Justice BRADLEY merely mentioned it as not sustaining an occupation tax so specialized as to discriminate against the products of another State; and after citing the latter case, Justice BLATCHFORD, in *Pickard v. Pullman S. Car Co.* (1886), 117 U. S. 34, 49, referred to *Machine Co. v. Gage*, with some others, as containing a collection of cases on the indication of Congressional pleasure from non-action, that interstate commerce should be free from State interference. Finally, in *Robbins v. Taxing District* (1887), 120 U. S. 489, 497, Justice BRADLEY delivering the majority opinion, in which a drummer's tax was declared invalid (*infra*, page 758), pointed out the controlling fact of the machines, though manufactured in another State, having been received at the office in Nashville and from thence peddled; that is, the arrival of the goods in the State placed them within its taxing power (*supra*, page 727), though the laying of a tax on a peddler, because the goods were made in another State, would transgress the Constitution freedom of trade, where the peddler had arrived from another State (*infra*, page 759), or while the goods remained in the Constitutional condition of an original package (*supra*, pages 721, 728, 459, 491).

In *Webber v. State of Virginia* (1881), 13 Otto (103 U. S.) 344, the plaintiff had been indicted in the County Court of Henrico, May 12, 1880, for selling Singer sewing machines, which had been manufactured in New York State, without having paid a tax required by, and not being excepted from, the Virginia Act of March 27, 1876, which provided that—

45. Any person who shall sell or offer for sale, the manufactured articles

or machines of other States or Territories, unless he be the owner thereof, and taxed as a merchant, or take orders therefor, on commission, or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States or Territories, and shall not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such articles, through the agency of another; but a separate license shall be required from any agent, or employee, who may sell, or offer to sell, such articles for another. For any violation of this section, the person offending shall pay a fine of not less than fifty dollars, nor more than one hundred dollars, for each offence: (Laws of 1875-6, pages 184, 185).

46. The specific license tax upon an agent, for the sale of any manufactured article or machine of other States or Territories, shall be twenty-five dollars; and this tax shall give to any party, licensed under this section, the right to sell the same within the county or corporation in which he shall take out his license; and if he shall sell, or offer to sell the same in any other of the counties or corporations of this State, he shall pay an additional tax of ten dollars in each of the counties or corporations where he may sell or offer to sell the same. *All persons, other than resident manufacturers, or their agents, selling articles manufactured in this State, shall pay the specific license tax imposed by this section:* (Id).

So far as the Singer machine was a patented article, all the courts followed *Patterson v. Kentucky*; *supra*, page 742.

Upon the question of discrimination between manufacturers in the State and those of other States, the County Judge, B. R. WELLFORD, read the two sections together, omitting the words in roman, and concluded that the purpose of the statute was to impose the tax upon the person, and not on the goods; hence the act was constitutional, following *Hinson v. Lott*, *supra*, page 735.

Under these rulings, Webber was convicted in the County Court, and this judgment was affirmed in the State Supreme Court of Appeals, upon the same grounds, in an opinion by Judge STAPLES: 33 Grat. (Va.) 898. The judgment was then removed to the Supreme Court of the United States and there reversed upon the ground of discrimination apparent from reading the two sections together, as the Virginia Court did, with the opposite result:—

By these Sections, read together, we have this result: the agent for the sale of articles manufactured in other States must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells, or offers to sell them; while the agent for the sale of articles manufactured in the State, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimi-

nation in favor of home manufacturers and against the manufacturers of other States. Sales by manufacturers are chiefly effected through agents. A tax upon their agents, when thus engaged, is therefore a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the State, it is, to that extent, a regulation of commerce in the articles, between the States. It matters not whether the tax be laid directly upon the articles sold, or in the form of licenses for their sale. If by reason of their foreign character, the State can impose a tax upon them, or upon the persons through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard, when they vested in Congress the power to regulate commerce among the several States: *FIELD, J., Webb v. Va.* (1881), 13 Otto (103 U. S.) 344, 350.

This was precisely the position of the Court in *Brown v. Maryland*, in response to the sentiment that there should be confidence in the State governments: (*supra*, pages 440-1): and it was fortified by a reference to and affirmance of *Welton v. Missouri*, *supra*, page 751.

Robbins v. The Taxing District (1887), 120 U. S. 489, began February 4, 1884, by the arrest of Sabine Robbins for doing business as drummer without license, in Memphis, Tennessee, then officially known as The Taxing District of Shelby County. Robbins was selling paper and stationery for Rose, Robbins & Co., of Cincinnati, Ohio, without complying with the State Act approved April 4, 1881, which amended a prior act to establish taxing districts, and especially—

SEC. 16. *Be it further enacted*, That subsection fifty (50) mentioned in the caption of this Act, be amended to read as follows: All drummers and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares or merchandise therein by sample, shall be required to pay to the County Trustee, the sum of ten dollars per week, or twenty-five dollars per month, for such privilege, and no license shall be issued for a longer period than three months: (Laws, page 114).

Robbins was convicted in the State Courts, and this judgment was affirmed in the State Supreme Court, on a unanimous opinion by COOPER, J., pointing out the policy of the

State to make the pursuit of numerous enumerated forms of business, a privilege to be paid for by all persons without discrimination, and supposing that the Constitutional right to require a license was well settled, especially as to the National Constitution, by *Osborne v. Mobile* (1873), 16 Wall. (83 U. S.) 479, a case of taxation of the agent of the Southern Express Company. *Robbins v. Taxing District* (1884), 13 Lea. (Tenn.) 303, 310. This judgment was then removed to the Supreme Court of the United States, and there reversed, March 7, 1887, upon an opinion by Justice BRADLEY, with the concurrence of Justices MILLER, HARLAN, MATTHEWS and BLATCHFORD (120 U. S. 489).

A dissenting opinion was read by Chief Justice WAITE, for himself and Justices FIELD and GRAY, in which the chief reliance was placed, as by the State Court, upon *Osborne v. Mobile*, just mentioned, where the opinion was delivered by Chief Justice CHASE, with the assent of Justices CLIFFORD, SWAYNE, MILLER, DAVID DAVIS, FIELD, BRADLEY, STRONG and HUNT. But this case is now of little value since the decision in *Leloup v. Mobile* (1888), 127 U. S. 640, where Justice BRADLEY delivered the unanimous opinion, denying the right of a State to require a telegraph company to pay a license fee for the transaction of interstate business.

This dissenting opinion in *Robbins v. Taxing District*, expressly disclaimed the consideration of a tax upon a drummer without samples; but this is now a matter of no importance, since the unanimous judgment of the Supreme Court of the United States in *Asher v. Texas* (1888), 128, U. S. 129, on an opinion also by Justice BRADLEY, affirming *Robbins v. Taxing District*, and declaring unconstitutional the Texas Act of May 4, 1882, amending the Revised Statutes of 1881, so as to read:—

ARTICLE 4665. That there shall be levied on and collected from every person, firm, company or association of persons pursuing any of the following named occupations, an annual tax, except when herein otherwise provided, on every such occupation or separate establishment, as follows:—
* * * * from every commercial traveler, drummer, salesman, or

solicitor of trade, by sample or otherwise, an annual occupation tax of thirty-five dollars, payable in advance ; * * * and every commercial traveler, drummer, salesman, or solicitor of trade who shall fail, or refuse to exhibit said receipt to such officer on demand by him, shall be deemed guilty of a misdemeanor, and fined, in a sum not less than twenty-five, nor more than one hundred dollars : (Laws, pages 18 and 19).

While this act covered those within the exception of WAITE'S dissenting opinion, Asher was in fact selling rubber stamps, and the opinion in his case, was an unqualified and unanimous assent to *Robbins v. Taxing District*. The opinion of the Court of Appeals of Texas undoubtedly forced the Supreme Court of the United States to the full extent of their previous position, for the Texas Judge (WHITE) said:

But such decisions, no more than the decisions of the State courts, are or should be binding upon the latter, if in themselves unwarranted assumptions of Constitutional authority—invocations of the Federal power, when such power does not and was never intended to apply and operate ; and, moreover, when said decisions are directly in conflict with well adjudicated cases of the same Court, which are not overruled, and which, in addition to their equal authority, are based upon fundamental and eternal principles of reason, justice and right : *Ex parte Asher* (1887), 23 Texas Ap. 662, 667 ; S. C. 27 AMER. LAW REGISTER, 77, 79-80.

Divested of its rhetoric, it will be observed that this Texas decision was founded upon the rule of uniformity declared in *Woodruff v. Parham*, and *Hinson v. Lott* (*supra*, pages 728, 735), and upon the exception recognized in *Osborne v. Mobile* (1873), 16 Wall. (83 U. S.) 479, and the case of the *State Tax on Railway Gross Receipts* (1873), 15 Wall. (82 U. S.) 284, where the power of a State to tax persons and property within its limits was declared not to be restrained by the mere fact that interstate commerce would be more expensively conducted ; hence Osborne, an express agent, was required to obtain a license, and the Philadelphia and Reading Railroad Company was required to pay a tax to the State which chartered it, upon its gross receipts, including those from interstate commerce.

These two last cases are directly in point. They were decided by a unanimous Court. They are not overruled in *Robbins v. Taxing District*, relied upon by the applicant in this case. They are directly in conflict with the Robbins case, and the Robbins case is simply the opinion of a

majority, and not of the whole Court. WAITE, C. J., in, to our minds, an unanswerable opinion, concurred in by those profound and eminent jurists, FIELD and GRAY, dissented from the doctrine announced. Under such circumstances, we do not feel bound by the Robbins decision, and not believing it to be the law of the land, we will not consider it as of binding force upon us: WHITE, P. J., *Ex parte Asher*, 23 Texas App. 674; 27 AMER. LAW REGISTER, 86-7.

It has already appeared that *Osborne v. Mobile*, is no longer a valid precedent (*supra*, page 759), and it may now be observed that the exception recognized in the case of the *State Tax on Railway Gross Receipts* (vide, page 760, *supra*), has been denied as to the business of carrying on interstate commerce by Justice BRADLEY in *Phila. & S. S. Co. v. Pa.* (1887), 122 U. S. 326, 342, and in *Leloup v. Mobile* (1888), 127 Id. 640, 646, where he said—

A great number and variety of cases, involving the commercial power of Congress, have been brought to the attention of this Court within the past fifteen years, which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been, that in order to give full and fair effect to the different clauses of the Constitution, the Court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice MARSHALL and other members of the Court in former times, and to modify in some degree certain *dicta* and decisions that have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached, upon the fairest and most just construction of the Constitution in all its parts. In our opinion, such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress: BRADLEY, J., *Leloup v. Mobile* (1888), 127 U. S. 640, 648.

To this statement of the prevailing principle of construction is appended a reference to the *Case of State Freight Tax* (1873), 15 Wall. (82 U.S.) 232; *Pensacola Tel. Co. v. W. U. Tel. Co.* (1878), 96 U. S. 1; *Mobile v. Kimball* (1881), 102 Id. 691; *W. U. Tel. Co. v. Texas* (1882), 105 Id. 460; *Moran v. N. O.* (1884), 112 Id. 69; *Gloucester F. Co. v. Pa.* (1885), 114 Id. 196; *Brown v. Houston*, *supra*, page 732; *Walling v. Michigan*, *supra*, 738; *Picard v. P. S. C. Co.*

(1886), 117 Id. S. 34; *Wabash R. R. Co. v. Ill.* (1886), 118 Id. 557; *Robbins v. Taxing Dist.* *supra*, page 758; *Phila. & S. S. Co. v. Pa.* (1887), 122 U. S. 326; *W. U. Tel. Co. v. Pendleton* (1887), Id. 347; *Ratterman v. W. U. Tel. Co.* (1888), 127 Id. 411. To these may be added *W. U. Tel. Co. v. Alabama* (1889), 132 U. S. 472, 477; *Bowman v. Chicago & N. W. RR. Co.* (1888), 125 Id. 465, 497; *Fargo v. Stevens* (1887), 121 Id. 230, 246; *Corson v. Md.* *supra*, page 750; and *Lyng v. Mich.*, *supra*, page 739, and the emphatic language of Justice BRADLEY, when writing the unanimous opinion of the Court in *Asher v. Texas*.

Turning to the dissenting opinion of Chief Justice WARRE, so highly praised in Texas but no longer law in any part of the Union, the principal foundation for it appears to be a supposed preference of strangers over citizens, largely based upon confusion of the two different methods of sale, by sample and by carrying and delivering the goods. Upon this confusion of thought, a portion of the majority opinion should be read :—

Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept for sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kinds of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other States? Must he sit still in his factory or warehouse and wait for the people of those States to come to him? This would be a silly and ruinous proceeding. * * * The truth is, that in numberless instances, the most feasible, if not the only practicable way for the merchant or manufacturer to obtain orders in other States, is to obtain them by personal application, either by himself or by some one employed by him for that purpose; and in many branches of business, he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. * * * But it will be said that a denial of this power of taxation will interfere with the right of the State to tax business pursuits and callings carried on within its limits. * * * It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the State gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even

on that of postmaster or United States Marshal. * * * If the selling of goods by sample, and the employment of drummers for that purpose, injuriously affect the local interest of the States, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it: for it is obvious that such regulations should be based on a uniform system, applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different States: BRADLEY, J., *Robbins v. Taxing District* (1887), 120 U. S. 489, 495-8.

The latest of the decisions giving freedom to drummers, is *Stoutenburg v. Hennick* (1889), 129 U. S. 141, which began by the arrest of William J. Hennick in Washington City, D. C., for acting as commercial agent of a Baltimore wholesale house, without having paid the license fee required by the District Act of August 23, 1871, Section 21:—

Third, Commercial agents shall pay two hundred and fifty dollars. Every person residing in the District of Columbia, whose business it is, as agents for nonresident manufacturers or wholesale dealers, to offer for sale merchandise, shall be regarded as a commercial agent: (Acts, Sess. 1, page 93).

Hennick was convicted, but only to be released upon *Habeas Corpus* by the District Supreme Court, May 9, 1887, because the Act was an unauthorized regulation of interstate commerce and obnoxious to the principle of the *Robbins Case* (*supra*, page 758). The discussion of the principles by which the decision was to be reached, extended also to the power of Congress over the District, but no final conclusion was reached as the case required nothing more than the determination that the local government erected by Congress, was municipal and not competent to exercise any larger powers: *Re Hennick* (1887), 5 Mackey 489. The case was then removed to the Supreme Court of the United States where the release of Hennick was affirmed, January 14, 1889, on an opinion by Chief Justice FULLER, on the ground taken in the *Robbins Case*, that such business required uniform regulation, and not Congressional action, directly or indirectly for the District alone. Justice MILLER dissented because the District of Columbia was not a State, a ground which is much too narrow, as was pointed out in the Court below:—

This District is set aside and dedicated to the uses of the Nation, and if there be anywhere on the face of the earth, a locality where no discrimination should be made as against the rights of any of the States, or any citizens of the United States, it should be upon this soil where all are equal, on which each citizen has an equal right and in which each State has an equal right, as regards all the other States, and as regards the United States itself. * * * We cannot suppose that when the Congress was vested with power to legislate over this District, it was clothed with any power to act as such Legislature, in hostility to the rights of the States, or to do anything regarding the interests of the citizens of one State, which any State of the Union could not do with regard to the citizens of any other State: MERRICK, J., *Re Hennick*, 5 Mackey 489.

These sentiments are very similar to the principle expressed by Justice MILLER, in *Crandall v. Nevada* (*supra*, page 464), when denying the validity of a tax upon each passenger leaving the State, as against the authority of *McCulloch v. Maryland* (1819) 4 Wheat. (17 U. S.) 316.

The people of the United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. * * * That government has a right to call to this point, any or all of its citizens, to aid in its service, as members of the Congress, of the Courts, of the Executive Departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. * * * But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it: MILLER, J., *Crandall v. Nevada* (1867), 6 Wall. (73 U. S.) 35, 43-4.

The final result of these progressive decisions is an affirmation of *Robbins v. Taxing District*, *Leloup v. Mobile*, *Asher v. Texas*, *Stoutenburg v. Hennick*, and *Lyng v. Michigan* (herein, pages 758, 759, 760, 763, 739, *supra*), in the case of *McCall v. California* (1890), 136 U. S. 104. This latest case began by the conviction of J. G. McCall, in the police court of the City and County of San Francisco, June 3, 1888, for soliciting passenger traffic in that City, for the Erie Railway, extending between Chicago and New York City, without having paid the quarterly fee required of "every railroad agency," by a municipal regulation (Order No. 1589 of the Board of Supervisors of the City and County of

San Francisco). Upon appeal to the Superior Court of that City, the judgment was affirmed, but upon removal to the Supreme Court of the United States, it was reversed, as the order imposed a tax on interstate commerce.

This effect of the order was denied by the California Court, on the ground that the business of soliciting passengers in California for a railroad wholly outside of that State, did not result in the introduction of anything into the State, and hence could not be an instrument of interstate commerce.

The argument is based upon the assumption that the provision in the Constitution of the United States relating to commerce among the States, applies as a limitation of power, only to those States, through which such commerce would pass, and that any other State can impose any tax it may deem proper upon such commerce. To state such a proposition is to refute it; for if the clause in question prohibits a State from taxing interstate commerce as it passes through its own territory, *a fortiori* the prohibition will extend to such commerce when it does not pass through its territory. * * * It is further said that the soliciting of passengers, in California, for a railroad running from Chicago to New York, if connected with interstate commerce at all, is so very remotely connected with it that the hindrance to the business of the plaintiff in error caused by the tax, could not directly affect the commerce of the road, because his business was not essential. The reply to this proposition is that the essentiality of the business of the plaintiff in error to the commerce of the road he represented, is not the test as to whether that business was a part of interstate commerce. * * * The test is—Was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road, to an extent commensurate with the amount of business done by the agent: LAMAR, J., *McCall v. Cal.* (1890), 136 U. S. 104, 110-11.

It seems advisable to add once more, that the subject of State and Congressional regulation of the instruments of commerce cannot be entered into, for want of space: the references already made to such cases as have reached the Supreme Court of the United States, are sufficient to show that the same general principles are there applied.

JOHN B. UHLE.

(To be concluded in the December number.)

Supreme Court of Pennsylvania.

PENNSYLVANIA RAILROAD CO. v. WEILLER.

A stipulation in a bill of lading that an agreed valuation shall cover loss or damage from any cause whatever, does not relieve the carrier from liability for the actual value of goods lost, when the loss has been caused by his own negligence.

But in such case the owner of the goods which have been lost through the negligence of the carrier, may recover from him their full actual value, notwithstanding the fact that a less value was agreed upon and that in consideration of such agreement a lower rate of freight was charged.

MITCHELL, J., dissents.

Error to the Court of Common Pleas No. 1, of Philadelphia County.

Trespass, by Hermann Weiller against the Pennsylvania Railroad Company to recover damages for the loss of four barrels of whiskey, caused by the alleged negligence of defendant. Plea, not guilty.

Upon the trial, before BREGY, J., it appeared that on June 15, 1887, the defendant received from Moore & Sinnott, at Belle Vernon, ten barrels of whiskey, to be carried over the line of its road to Philadelphia, and delivered to Hermann Weiller, the plaintiff, the owner and consignee thereof. While the shipment was in the possession of the Pennsylvania Railroad Company, four barrels of the whiskey were lost or destroyed by a wreck occurring on defendant's railway. The whiskey was shipped under a bill of lading, of which the material clauses were as follows :—

Received, June 15, 1887, from Moore & Sinnott, the following described property, in apparent good order (contents, and condition of contents, of packages unknown), to be transported to and delivered at the regular freight station of the company at Philadelphia, Pa., subject to all the *conditions* following and *upon the back of this receipt*, and to be delivered in like good order, subject to the said conditions, upon payment of *freight* and advanced charges, and upon payment also of all charges accruing under the said conditions. . . .

It is mutually agreed, and it is the spirit of this *contract*, that the Pennsylvania Railroad Company, hereinafter designated the carrier, shall transport the above-named merchandise with all due care and dispatch to

its destination, or to the terminus of its line in the direction of destination, and tender it to the consignee, or to the connecting carrier, as the case may be, in the same apparent good order and condition in which it was receipted for at point of shipment, and in case of loss from any cause within the carrier's reasonable control, shall pay for the same at the net invoice price, freight charges added if paid (unless a lower value of the articles has been agreed upon with the shippers, and such value noted hereon, or same is determined by the classification upon which the rates are based), and in case of damage through the negligence of the carrier's servants, shall pay a just assessment of same, the carrier to have the full benefit of any insurance that may have been effected upon or on account of said goods. . . .

The carrier shall not be liable for loss or damage by causes beyond its reasonable control, by *fire* from any cause and wheresoever occurring; by riots, strikes, or stoppages of labor, or by any of the causes incident to transportation, such as chafing, heating, freezing, leakage, rust or any other reason not directly traceable to the negligence of the carrier's servants. . . .

And, finally, in accepting this shipping receipt, the shipper, owner and consignee of the goods, and the holder of the shipping receipt, agree to be bound by all its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such a shipper, owner, consignee or holder.

When a valuation as agreed upon shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damage from any cause whatever.

By a provision of the bill of lading the whiskey was valued at twenty dollars per barrel. The evidence showed that this provision was inserted by the shippers, and there was no question in the case as to their knowledge of the contents and terms of the bill of lading; that there were two rates of freight fixed by the company for the carriage of freight of this character, to wit, thirty-three cents per hundred pounds, and twenty-eight cents per hundred pounds, and that the lower rate was given to shippers at their own request, upon their entering into a contract, which was written into the bill of lading, that in case of any loss or damage no greater sum should be recovered than the valuation fixed therein, being in this instance a lower valuation than the actual value of the whiskey. The defendant offered to pay the plaintiff for the barrels of whiskey destroyed at the valuation fixed in the bill of lading, to wit, twenty dollars per barrel. The plaintiff refused this offer.

Defendant requested the Court to charge—

(1) A common carrier is entitled by agreement with the shipper, and in consideration of an undertaking to transport merchandise at a low rate of freight, to limit its liability by fixing a value upon the merchandise, beyond which it cannot be held responsible. This having been done in the present case, there can be no recovery beyond the value of the whiskey fixed in the bill of lading, to wit, twenty dollars per barrel.

Refused.

(2) Under all the evidence in this case there can be no recovery by the plaintiff beyond the amount of twenty dollars per barrel for the barrels of whiskey not delivered, with interest upon that amount from the date when the delivery should have taken place.

Refused.

The Court charged the jury as follows :—

“ Under my view of this evidence and the papers in the case, I instruct you to find for the plaintiff for the value of the whiskey less the freight; that is \$257.27 less \$11.77, with interest thereon.”

Verdict accordingly and judgment thereon. Defendant then took this writ, assigning for error the charge of the Court and the refusal of its points.

George Tucker Bispham, for plaintiff in error.

Edward H. Weil, for defendant in error.

GREEN, J., April 21, 1890. In the case of *Elkins v. Empire Transportation Co.* (1876), *81 Pa. 315, no question of negligence, or of the carrier's right to limit his liability for his acts of negligence, was raised, discussed, or decided either in the Court below or in this Court. The reporter says the cause of action set out in the declaration was the loss of certain high wines delivered to defendant, but lost by negligence. This is the only reference to the subject of negligence to be found in the entire report of the case. The record shows that the case was not tried upon any theory of negligence, but exclusively upon the terms, and interpretation of the contract as contained in the bill of lading. No

question was made upon the subject of the right of the carrier to limit his liability for the loss occurring by his own negligence, and we are bound to assume that the facts of the case did not give rise to such a question. Nothing was said upon that subject either in the argument of counsel, or in the charge of the Court below, or in the opinion of this Court. It was for this reason that no reference was made to this case in the opinion of this Court in the case of *Grogan & Merz v. Adams Express Co.* (1886), 114 Pa. 523. The same reason is applicable now. It may be that the accident in the Elkins case was not the result of any negligence of the carrier. Judging from the names of the counsel concerned, it is almost certain that if the facts had developed a case of negligence, and the question of the right of the carrier to limit his liability for acts of negligence, that question would have been promptly raised, discussed and decided.

In the present case the question does arise under the conditions annexed to the bill of lading. Many enumerated causes of loss are expressly excepted, such as fire, riots, strikes, heating, freezing, leakage, rust, etc., and as to these the right of the company to limit its liability must be affirmed in accordance with numerous decisions of this and other Courts. But the final clause of the conditions stipulates that, "When a valuation as agreed upon shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damage from any cause whatever." As this necessarily includes loss arising from negligence, and as the testimony tended to establish a loss by negligence, the question of the efficacy of the clause under consideration to relieve the company from liability for negligence beyond the agreed value, necessarily arises. Upon that subject we have so recently expressed ourselves in the case of *Grogan & Merz v. Adams Express Co.*, *supra*, that we think it unnecessary to repeat either the text or substance of the opinion there announced. So far as the question at issue is concerned, we can see no difference between that case and this.

Judgment affirmed.

MITCHELL, J., (*dissenting*.) To allow a shipper to value his goods for purposes of freight charges, etc., at one price, and then when they are lost, to recover, as in this case, three times his own agreed value, is a direct premium on fraud such as no Court ought to sanction. The public policy which prohibits a common carrier from contracting against the negligence of his employes, or, expressing the rule in commercial language, which prohibits a shipper from becoming his own insurer against accidental loss, if he so chooses, by paying a lower rate of freight, was founded upon a condition of things which has passed away, and the rule itself should, in my opinion, be materially modified, if not abrogated altogether in regard to goods. That, however, is an alteration of the law which is legislative in its scope and cannot be properly made by the Courts. I am, therefore, in favor of adhering to the rule as far as it has been settled by the decisions, but would not extend it in the slightest degree. In this case the public were offered two plans: a full liability at a regular rate, or a stipulated maximum liability at a reduced rate. The plaintiff, with full knowledge, chose the latter. Upon the reasonableness of such a regulation, the argument of Lord BLACKBURN, in *Manchester S. & L. Ry. Co. v. Brown* (1883), L. R. 8 App. Cases, 703, 712, is in my judgment unanswerable. "When there has been a fixed rate, if it be shown in point of fact that although people can have their goods reasonably carried at that rate, they do enter into agreements of this sort to have them carried at another rate, that is extremely strong evidence that the agreement is reasonable." Instead of "extremely strong," I should say conclusive. The observations of Lord BRAMWELL, in the same case, are also worthy of careful reading.

Because I believe this case to be a step beyond the previous decisions on the subject, I am compelled to dissent from this judgment.

STERRETT and WILLIAMS, JJ., absent.

The doctrine which is followed by the majority of the Court in this case, is in consonance with a line of Pennsylvania decisions, beginning with *Farnham v. Camden & Amboy R.R. Co.* (1867), 55 Pa. 53. In that case the plaintiffs had shipped from Philadelphia for New York certain bales of goods. Subject to a condition in the bill of lading that "the responsibility of the company as carriers of the within named goods is hereby limited so as not to exceed \$100 for every 100 lbs. weight thereof, and at that rate for a greater or less quantity, the shipper declining to pay for any higher risk." The goods were carried in safety to New York and deposited under a shed upon the wharf of the railroad company, where they were destroyed by fire, the company, however, being chargeable with no negligence. The Court held that by the special contract limiting the liability of the carrier, its liability ceased to be that of an insurer and became that of a bailee for hire. "It does not admit of a doubt," said THOMPSON, J., "that a common carrier may by a special contract, and perhaps by notice, limit his liability for loss or injury to goods carried by him, as to every cause of injury, excepting that arising from his own or the negligence of his servants. A great variety of cases cited in the very able argument of the learned counsel for the defendants [JAMES E. GOWEN and ASA I. FISH, one of the original editors of the AMERICAN LAW REGISTER] established this as the rule in England, from *Southcote's Case*, 4 Coke's Rep. 84, A. D. 1601, down to *The Peninsular and Oriental Steam Navigation Co. v. The Hon. Farquhar Shand*, 11 Jurist,

771, in 1865. The same rule generally holds in the several States in this country, as will appear in Story on Bailments, 549, notes a and b; *Dow v. New Jersey Steam Navigation Co.* (1854), 1 Kern (N. Y.) 484; and in the Supreme Court of the United States in *York Co. v. The Central R.R. Co.* (1866), 3 Wall. (70 U. S.) 107. This has long been the rule in this State, as is shown by *Bingham v. Rogers* (1843), 6 W. and S. (Pa.) 495; *Laing v. Colder* (1848), 8 Pa. 479; *Camden & Amboy R.R. Co. v. Baldauf* (1851), 16 Id. 67; *Chouteaux v. Leech* (1852), 18 Id. 224; *Goldey v. Pennsylvania R.R. Co.* (1858), 30 Id. 242; and *Pennsylvania R.R. Co. v. Henderson* (1865), 51 Pa. 315." But, he adds, "the doctrine is firmly settled that a common carrier cannot limit his liability so as to cover his own or his servants' negligence, nor do I suppose this possible of any bailee."

The next case was *American Express Co. v. Sands* (1867), 55 Pa. 140, decided at the same term of Court. Sands had shipped a barrel-saw by the Express Company from Pittsburgh to Irvine, Warren Co., Pa. When delivered, the saw was cracked and useless, and was therefore not accepted. Sands brought suit against the company, claiming as damages the full value of the saw and obtained a verdict for \$475, upon which the Court entered judgment, notwithstanding the fact that the bill of lading had contained a stipulation that the Express Company was not to be held liable "for any loss or damage of any box, package or thing for over \$50, unless the just and true value thereof is herein stated," there being no other statement of the value of the article shipped. Judge

(afterwards Chief Justice) THOMPSON, again delivered the opinion of the Court, which was as follows: "The principles involved in this case were all discussed in an opinion delivered at this term, *Farnham v. Camden & Amboy RR. Co.*, *supra*. It was there held that the company might limit the extent of liability in case of loss or injury, by a special contract or special acceptance of the goods to be carried, and thus become subject to the laws of bailment only; but that there could be no limitation of liability where the loss or injury resulted from the negligence of the company or its servants. Was there negligence in the case before us? There are numerous authorities cited in the case referred to, to show that when goods are lost or damaged while in the custody of the carrier under a special contract, and he gives no account of how it occurred, a presumption of negligence will follow of course. That is just the case before us, and hence it was right to hold the company liable to the extent of the full value of the saw."

The authority chiefly relied on by the majority of the Court in the principal case, is *Grogan v. Adams Express Co.* (1886), 114 Pa. 523. In that case the plaintiffs had shipped by the express company a package containing jewelry, valued at \$198. The shipping receipt contained the following clause: "Nor in any event shall the holder hereof demand payment beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them and so specified in this receipt." The Court below instructed the jury that this clause was a

valuation and a binding contract, "a determination on the part of these parties as to the value of that package, and governs this transaction, unless the company took and appropriated it to its own use when it would have to pay the whole of it." In this instruction the Court expressly followed *Hart v. Pennsylvania RR. Co.* (1884), 112 U. S. 331, a case which will be discussed later in this annotation. In reversing the lower Court, the Pennsylvania Supreme Court (GREEN, J.), after commenting upon the three cases already cited, go on to say: "How is it in the case at bar? We think that it must be conceded that by the terms of the express receipt, signed by the company's agent, and delivered to, and accepted by the plaintiffs, the article shipped was valued at fifty dollars, and the company limited its liability to that sum, and this limitation would be a protection against liability beyond that amount, except for negligence. It is a contract almost precisely similar to the one upon which we passed, in the case of the *American Express Co. v. Sands*, *supra*, but is stronger than that in favor of the carrier, because it contains an express agreement that the article forwarded was valued at fifty dollars, which the receipt in the *Sands* case did not. But the Express Company in the present case failed to account for the non-delivery of the article, and hence a presumption of negligence arose, which they should have rebutted in order to escape liability, but they did not do so. * * * The learned Court further charged the jury that the defendant could limit its own liability, even as against its own negligence, and had done so by the re-

ceipt given to the plaintiffs when the goods were shipped. This was done in obedience to a decision of the Supreme Court of the United States in the case of *Hart v. Pennsylvania RR. Co.*, *supra*. An examination of that case shows that such is the law as declared by that Court, and if the decision were of binding authority upon us, we would be obliged to follow it. But our own decisions for a long time have established the opposite doctrine, until it has become firmly fixed in our system of jurisprudence. We could not depart from it now without overruling them all, and we are not willing to do so. The authorities upon the general subject are very numerous and conflicting. But with us the rule has been uniform and we prefer to adhere to it."

Prior to *Grogan v. Adams Express Co.*, the case of *Elkins v. Empire Transportation Co.* (1876), 81 Pa. 315, had come before the same Court. This was an action for the value of fifty barrels of high wines, which had been shipped under a bill of lading containing a stipulation that the amount of loss or damage should "be computed at the value or cost of said goods or property at the place and time of shipment." The rate of freight, "50 cents per 100 pounds," and the words "Valuation \$20 per barrel" were written in the blanks of the printed bill of lading. The report of the case shows that a portion of the goods were lost by an accident on the railroad, which does not seem to have been explained by the Transportation Company, so as to relieve it from the presumption of negligence, which was alleged in the declaration. The Court below charged that "if

there was no contract limiting the responsibility, they (the carriers) are responsible for the whole loss; but if there was a contract, either express or implied, that they were not to be held liable beyond \$20 per barrel, they are not liable beyond that." This instruction was assigned as error, but the Supreme Court affirmed the judgment, saying: "The valuation of \$20 per barrel, written into the blank of the printed bill of lading, together with the stipulated freight at fifty cents per one hundred pounds, are controlling parts of the bill of lading, and not controlled by the printed stipulation that the amount of the loss or damage accruing and falling on the carriers shall be computed at the value or cost of the goods at the place and time of shipment. These parts, written into the printed bill, express the true contract of the parties, and the \$20 per barrel must, therefore, be regarded as the value or cost, fixed by the parties in advance, as that to be treated as such, as of the time and place of shipment. This accords with the evidence that such freight, if left to be determined in value at the place and time of shipment, would not be carried at less than \$1.60 per one hundred pounds. There was ample consideration, therefore, for the low valuation in this diminution of the freight as stipulated at fifty cents." This decision is apparently in conflict with the other Pennsylvania cases, but is distinguished in the majority opinion in the principal case.

In *Pennsylvania RR. Co. v. Raiordon* (1888), 119 Pa. 577, a still later case than those cited by the majority of the Court, it was said in an opinion by WILLIAMS, J.: "It is too late to deny that in

Pennsylvania a common carrier may limit his liability by a special contract. In *Atwood v. Reliance Transportation Co.* (1839), 9 Watts (Pa.) 87, GIBSON, C. J., recognized the rule as well established, although expressing grave doubts of its wisdom. In *Laing v. Colder* (1848), 8 Pa. 479, this Court again gave its assent to the rule, while BELL, J., by whom the opinion was delivered, expressed his sympathy with the doubt of Chief Justice GIBSON. The same rule has been held in many later cases, among which are *Powell v. Pennsylvania R.R. Co.* (1859), 32 Pa. 414; *American Express Co. v. Sands* (1867), 55 Id. 140; *Pennsylvania R.R. Co. v. Miller* (1878), 87 Id. 395; *Adams Express Co. v. Sharpless* (1876), 77 Id. 517; *Clyde v. Hubbard* (1879), 88 Id. 358. It is equally well settled that such limitation does not relieve the carrier from liability for his own negligence: *Pennsylvania R.R. Co. v. Miller*, *supra*. The reason for this qualification of the power to limit liability rests on public policy."

The contrary doctrine to that of the Pennsylvania cases is broadly stated by the Supreme Court of the United States in *Hart v. Pennsylvania R. R. Co.* (1884), 112 U. S. 331. It is there said by Justice BLATCHFORD: "It is the law of this Court, that a common carrier may, by special contract, limit his common law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants: *New Jersey Steam Nav. Co. v. Merchants' Bank* (1848), 6 How. (47 U. S.) 344; *York Co. v. Central R. R. Co.* (1866), 3 Wall. (70 U. S.) 107; *The New York Central R. R. Co. v. Lockwood* (1873), 17 Id. (84 U. S.)

357; *The Southern Express Co. v. Caldwell* (1875), 21 Id. (88 U. S.) 264; *The Ogdensburg, etc. R. R. Co. v. Pratt* (1875), 22 Id. (89 U. S.) 123; *Bank of Kentucky v. Adams Express Co.* (1876), 93 U. S. 174; *The Grand Trunk Ry. Co. v. Stevens* (1878), 95 Id. 655. * * *

To the views announced in these cases we adhere. But there is not in them any adjudication on the particular question now before us. It may, however, be disposed of on principles which are well established and which do not conflict with any of the rulings of this Court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed: 2 Kent's Comm. 603, and cases cited; *Relf v. Rapp* (1841), 3 W. & S. (Pa.) 21; *Dunlap v. International Steamboat Co.* (1867), 98 Mass. 371; *The N. Y. Cent. and Hudson River R. R. Co. v. Fraloff* (1879), 100 U. S. 24. This qualification of the liability of the carrier is reasonable, and is as important

as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses [the subject matter of the contract there in question], and had been told by the plaintiff the sum inserted in the contract. The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repug-

nant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

* * * The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

In the opinion quoted, the fact is recognized that the decisions in this country on the question there discussed, are at variance. It therefore becomes necessary, to a full comprehension of the present status of the law of the United States upon this subject, to make a careful examination of the rulings of the Courts of last resort in the various States.

In *Alabama*, the earlier decisions are in accord with the Pennsylvania rule, but of late tendency has been in the contrary direction. Thus in the earliest case upon the subject, *Mobile & O. R. R. Co. v. Hopkins* (1868), 41 Ala. 486, the Court held that a limitation of value "may be made by special contract, but that a common carrier cannot exempt himself, by any such contract, from liability for the negli-

gence, willful default, or tort, of himself or his servants; and this upon the familiar principle, that whatever has an obvious tendency to encourage guilty negligence, fraud or crime, is contrary to public policy,"—citing *Camden & A. R. R. Co. v. Baldanf* (1851), 16 Pa. 67. To the same effect is the doctrine enunciated in *South & North Ala. R. R. Co. v. Henlein* (1875), 52 Ala. 606, and *Same v. Same* (1876), 56 Id. 368, although in these cases the Court assumed the right to judge whether the limitation was just and reasonable, and proportionate "to the real value of the animal [the subject-matter of the contract was a mule] and the amount of freight received." In *Ala. Great Southern R. R. Co. v. Little* (1882), 71 Ala. 611, the law is very positively stated to be that "for the want of ordinary care, skill and diligence, from which a loss results, the carrier is liable for the value of the goods, as would be any other paid bailee or agent, and for exemption from this liability he has not stipulated, and the law will not tolerate that he should stipulate." This case is followed in *Louisville & N. R. R. Co. v. Oden* (1885), 80 Ala. 38, but the latest case, *Louisville & N. R. R. Co. v. Sherrod* (1887), 84 Id. 178, appears to adopt the views of the United States Supreme Court. While this case attempts to distinguish the earlier Alabama decisions, its practical effect is to overrule them. It is there said by CLOFTON, J.: "Limitations as to value do not come under the operation of the rule, that a carrier cannot, by special contract, exempt himself from liability for the consequences of his own negligences, and ordinarily are not calculated to induce negligence.

To the amount of the agreed valuation the carrier is responsible for loss occasioned by his neglect, or by any of the risks or accidents for which he is answerable. No public good will be subserved by denying to the parties the right to make such contracts. The shipper and the carrier may lawfully contract as to the valuation of the articles to be transported. Such special contract is in the nature of an agreement to liquidate the damages, proportionately to the compensation received for the carriage, and the responsibility of safely carrying and delivering. * * * When the value has been thus fairly agreed on, the carrier cannot recover a greater rate, and the shipper should not be allowed to take benefit of the reduced rate, if there is no loss, and to repudiate the contract, if there is a loss." The Court, however, states as a qualification of the rule, that "such special contracts may be avoided by wilful or wanton negligence in disregard of the rights of the shipper." Under this case, the Alabama rule must be held to sustain limitations of value by special contract, even where the loss is occasioned by negligence, provided it is not wilful or wanton.

In *Arkansas*, the rule of *Hart v. Pa. RR. Co.* has been expressly adopted and followed: *St. Louis, I. M. & S. Ry. Co. v. Lesser* (1885), 46 Ark. 236; *St. Louis, I. M. & S. Ry. Co. v. Weekly* (1887), 50 Id. 397. In the latter case the Court say: "As a general rule, the common carrier is bound to receive and carry that which is offered to him for transportation. He ought to be entitled to a reasonable reward for his services. As the risk of conveying property of considerable value is greater than that of small

value, the care required is, and the reward should be, greater. It is, therefore, reasonable and right that the value of the property shipped should be ascertained in order that the carrier may know the extent of his responsibility and the care and attention required, and fix the amount of his reward. * * * If, therefore, the measure of the liability of the carrier as agreed upon is adjusted by the reward to be received by the carrier under his contract, and the contract of shipment is fairly entered into, and no deceit is practised upon the shipper, the contract is reasonable as to the measure of liability and should be upheld." In both of these cases negligence was alleged.

[In *California*, the question would seem to be governed by the Civil Code of that State, which provides: "SEC. 2174, The obligation of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

"SEC. 2175, A common carrier cannot be exonerated by any agreement made in anticipation thereof, from liability for the gross negligence, fraud or willful wrong of himself or his servants.

"SEC. 2176, A passenger, consignor or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated, and also to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes is lost or injured, when the value of such property is not named; and also to the limitation stated therein to the carrier's

liability for loss or injury to live animals carried. But his assent to any other modification of the carrier's obligations contained in such instrument, can be manifested only by his signature to the same." And it is further provided by—

"SEC. 2200, A common carrier of gold, silver, platina, or precious stones, or of imitations thereof, in a manufactured or unmanufactured state; of timepieces of any description; of negotiable paper or other valuable writings; of pictures, glass, or china ware; of statuary, silk, or laces; or of plated ware of any kind, is not liable for more than fifty dollars upon the loss or injury of any one package of such articles, unless he has notice, upon his receipt thereof, by mark upon the package or otherwise, of the nature of the freight; nor is such carrier liable upon any package carried for more than the value of the articles named in the receipt or the bill of lading." The recent case of *Scammon v. Wells, Fargo and Co.* (1890), 84 Cal. 311, was decided under this last section, the Court saying, "this measure of damages was adopted for the protection of the carrier, and does no injustice to the owner."

[In *Ormsby v. U. P. Ry. Co.* (1880), U. S. C. Ct., D. Colorado, 2 McCrary 48, there was a printed statement appended to the contract, headed "Rules and regulations for the transportation of live stock," which contained a schedule of amounts for which the company would be liable in case of damage or injury to such livestock, but such statement was not signed by the plaintiff or his agent. The Court therefore charged the jury that the statement was "not in the contract, * * * that the shipper is only bound by the stipula-

tions contained in the contract itself," and that such "rules and regulations for the transportation of live stock, printed at the head of this contract, * * are not a part of the contract with this plaintiff." In *Overland Mail & Express Co. v. Carroll* (1883), 7 Colo. 43, the Court said: "Appellant [the Company] could not make a binding contract with the owner, whereby it should be released from all liability in case of loss through negligence. Upon the same principle, it could not make a binding contract with him limiting its liability for loss occasioned by its negligence to fifty dollars, or to any other sum short of the actual value of the goods shipped, provided of course, that it had notice of such actual value when it received them."

[In *Lawrence and others v. The New York, Providence & Boston R.R. Co.* (1869), 36 Conn. 63, there was a clause in the bill of lading "that no responsibility will be admitted under any circumstances to a greater amount upon any article of freight than two hundred dollars, unless upon notice given of such amount, and a special agreement therefor." The Court below charged the jury that the plaintiffs were entitled to the full value of the goods lost, but the appellate Court said, "This was clearly wrong. There was no claim or pretense of any gross negligence on the part of the defendants. They stored the goods in their depot, because the boat that evening was so full that that it could not take them. They had therefore to lie over for the boat of the following day; and in the meantime, they were destroyed by an accidental fire. And it is

admitted that no notice was given of the value of the packages beyond two hundred dollars. We think, therefore, that the most the plaintiffs should have been permitted to recover is two hundred dollars for each package, instead of the full value of the packages." The case of *Welch v. The Boston & Albany R.R. Co.* (1874), 44 Conn. 333, supports the rule that if a special contract relieves from all liability, it is void. If it limits responsibility to the exercise of ordinary care, * * the company have the benefit of their contract.

[In *Dakota*, the question is governed by the Civil Code. which provides, "§ 1261, The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

"§ 1262, A common carrier cannot be exonerated by any agreement, made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants.

"§ 1263, A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to the other modifications of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same." The case of *Hartwell v. N. P. E. Co.* (1889), 5 Dak. 463, was decided under these sections. There, the defendants sought to free themselves from liability on the ground that there was a special contract limiting the amount to be claimed, and the time within which notice of loss was to be

given, but the Court held there was no special contract, the plaintiff not having signed any document or paper, the receipt being a mere notice which would not limit the carrier's liability.

[In the *District of Columbia*, the carrier is held liable for the actual value of the goods, for in *Galt v. Adams Express Company* (1879), *McArthur & Mackey* (S. Ct. D. C.) 124, JAMES, J., says: "We hold * * that the principle of law which for considerations of public welfare forbids a common carrier to bargain in particular cases for complete exemption from responsibility for a violation of his duties, forbids him to impair his obligations to the community by bargaining in particular cases for an exemption from a considerable part of that responsibility. The ground on which the rule is based, that even the shipper's perfect consent can not wholly relieve the carrier, is, that the object which he undertakes to regulate by contract is not his own but a public right. * * The principle of the rule is that an agreement which operates to interfere with the public right touching the care and good faith of common carriers, is an agreement against public policy and welfare, and is, therefore, void; and as an agreement that his negligence shall be cheap must operate in this way, it necessarily falls within that principle." In this case the carrier's liability was limited to fifty dollars unless specially insured, and specified in the receipt.

[The Code of *Georgia* provides, "§ 2068, a common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given on tickets sold. He may make an express

contract and will then be governed thereby." In *Southern Express Co. v. Newby* (1867), 36 Ga. 635, it was held under this section, that a receipt stipulating for exemption from liability and limiting the amount to be recovered to a certain amount per package, unless the real value be named at the time of shipment, was not a special contract within the section, and the company were therefore liable for the full value. To the same effect, *Purcell v. Southern Express Co.* (1866), 34 Id. 515.

[In *Illinois*, there would seem to be some conflict of opinion upon the question. *The Western Transportation Co. v. Newhall, et al.* (1860), 24 Ill. 466, was a case where there were certain qualifications and conditions on the back of the receipt, which the company contended formed a part of its contract, and there the Court say, "We believe the rule to be now well settled, that the common law liability of a common carrier cannot be so restricted, for notwithstanding the notice, the owner has a right to insist that the carrier shall receive and carry the goods, subject to all the incidents of his employment, and there can be no presumption when they are delivered to, and received by, the carrier, that the owner intended to abandon any of his legal rights, or yield to the wishes of the carrier. * * A common carrier being regarded as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from the act of God or the public enemy, it is not deemed salutary policy, that he shall escape this liability, by such general notices as we are considering. He may qualify his

liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight and the like; as for example, that he will not be responsible for goods above the value of a certain sum unless they are entered as such, and paid for accordingly." Later cases would, however, seem to conflict with this opinion.

In *Adams Express Company v. Stettaners* (1871), 61 Ill. 184, goods were shipped from Chicago to New York, worth in fact \$400, for which the company gave a receipt, limiting its liability to \$50, in case of loss, of which the shipper had notice. The Court held that "even if it should be conceded that the shipper in this case must be considered as having assented to the terms of the bill of lading, we cannot hold the carrier excused from the exercise of reasonable and ordinary care. Courts have often had occasion to express their regret that common carriers have been permitted, even by contract, to discharge themselves from the obligations imposed by the salutary rules of the common law. It is very unreasonable in the carrier to say that it will, in no event, be liable beyond the sum of \$50 in the absence of a special contract, though it may have received much more than that sum merely in the way of freight. If common carriers desire to deal fairly with the public, it would be very easy for them to require the shipper to specify the value of the merchandise and insert the amount in the receipt, making their charges in proportion to their liability. If the shipper should falsely state the

value he could not complain at being held to his own valuation. In order to prevent the carrier from releasing himself, by contract, from all liability, courts have laid down the rule above stated that he cannot even by contract, exempt himself from the exercise of reasonable care."

[In *Oppenheimer & Co. v. U.S. Express Co.* (1873), 69 Ill. 62, Mr. Justice SHREDON in delivering the opinion of the Court, said: "A distinction exists between the effect of these notices by a carrier which seek to discharge him from duties which the law has annexed to his employment, and those, like the one in question, designed simply to insure good faith and fair dealing on the part of his employer—in the former case notice alone not being effectual, without an assent to the attempted restriction; while in the latter case, notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient. * * The common carrier is liable, as we find it frequently laid down, in respect to his reward, and the compensation should be in proportion to the risk. As the common carrier incurs a heavy responsibility, he has a right to demand from the employer, such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust. And such a limitation of the carrier's liability as the one in question is held to be reasonable and consistent with public policy. But independent of the qualifying provision contained in the receipt, we should be inclined to sustain the defendant's claim of exemption from liability on the ground of a

want of good faith in not disclosing the value of the goods."

[The question was again raised in *Boscowitz et al. v. The Adams Express Co.* (1879), 93 Ill. 523, where the printed conditions on the receipt limited the carrier's liability to \$50, "unless the just and true value" of the goods "is herein stated," and here the Court remarked, "It is a proposition so plain it will not be controverted, that defendant can claim no exemption from liability for the loss of the goods as a common carrier, except such as given by express contract. Neither in the written nor printed part of the receipt is there any express contract, making exemptions in favor of the defendant company. * * But admitting the conditions in the receipt were understandingly assented to by the shippers and became a binding contract between the parties, still defendant would be liable for the full value of the goods if the loss was owing to negligence on the part of the railroad company." In this case, SHELTON, J., delivered a dissenting opinion, following the lines taken by him in *Oppenheimer & Co. v. U. S. Express Co.*, *supra*.] In the recent case of *Chicago & N W. Ry. Co. v. Chapman*, decided May 14, 1890, the Supreme Court say: "We are not unmindful that a contrary rule has been announced by courts of the highest respectability, and among them the Supreme Court of the United States. Notwithstanding the great respect we entertain for the very learned and eminent tribunals which have thus held, we are so strongly committed to the doctrine before announced that we feel compelled to adhere to the rule so long and firmly established in

this State. And notwithstanding the persuasive weight of the rulings of these eminent tribunals, and of the reasons given for their decisions, we are still satisfied that the rule laid down in this State is based upon sound reason and a wise public policy, and is also supported by the decided weight of authority." The rule followed is stated to be that the carrier "may not exempt himself from liability for damages resulting from the gross negligence or wilful misconduct of himself or his servants," and this rule is held to apply to a stipulation as to value.

[In *Indiana* the question was raised in the case of *Rosenfeld v. The Peoria, D. & E. RR. Co.* (1885), 103 Ind. 121, where blanks in the bill of lading were filled up with characters almost illegible, but which on being interpreted meant "Leaks and outs excepted, \$20 railroad valuation." This was followed by a statement thus, "in the event of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the settlement of the same." The company contended that its liability was limited to \$20. In the opinion of the Court it is said: "If they may contract against all liability for loss by means other than their own negligence or fraud, of course they may contract for the amount of recovery in such cases. But in case of a loss through their negligence or fraud, the same reasons, at first view, would seem to exist against contracts limiting the amount of recovery as exist against contracts for total exemption. * * If without any representation of value by the shipper, or a request of him for a statement of value, and without no-

tice and contract, and a valuable consideration, the carrier should place a value upon the articles received for carriage, that would not bind the shipper. In such case, he would clearly have the right to recover the full value of the articles lost by the carrier. If, on the other hand, for the purpose of getting reduced rates, the shipper should place a value upon the articles for carriage, or if by any kind of artifice he should induce the carrier to place a lower value upon the articles, and thus get reduced rates, it seems to be settled by the weight of authority that he could not recover beyond the value so fixed by him, or the value which by deceit he caused the carrier to fix. * * That carriers may, by fixing value, limit this common law liability, it must be shown that the shipper had some kind of knowledge of such fixing of value, and for a sufficient consideration consented thereto, or that his statements or conduct justified the carrier in so fixing the value." *The Adams Express Co. v. Harris, et al.* (1889), 120 Ind. 73 to the same effect.

[The public laws of Iowa relating to Railroads (Rev. Stat. 1888), provide: "2007, No contract, receipt, rule, or regulation, shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made or entered into." By section 3371, the above provision is applied to warehousemen and common carriers. The case of *Hart v. The Chicago & N. W. Ry. Co.* (1886), 69 Iowa 485, was decided under this clause, the contract of carriage limiting the company's

liability to one hundred dollars per horse. REED, J., there says: "Whether a common carrier, in the absence of any statute restricting his powers in that respect, can, by rule, regulation or contract, limit his liability for the property received by him for carriage, has been the subject of much discussion, and there is great conflict in the decision of the courts on the question. We have no occasion, however, in this case, to enter into that question. No one would question that in the absence of a contract limiting the amount of his liability, the shipper would be entitled, in case of the destruction or injury of the property under such circumstances as that the carrier was liable for the loss, to recover full compensation for injuries sustained. The statute quoted above prohibits the making of any contract that would exempt him from the liability of a common carrier which would exist if no contract, rule or regulation existed. If the statute is applicable to a contract in which the understanding is to transport the property from this State into another State or territory of the United States, it cannot be doubted, we think, that the provision of the contract in question, by which it was sought to limit the liability of defendant for the horses to an amount less than the actual value of the property, is repugnant to its provisions, and consequently invalid." To the same effect, *McCune v. The B., C. R. & N. R. Co.* (1879), 52 Iowa 600.

In *Kansas*, the carrier is held responsible for the actual value of goods lost by his own negligence: *Kansas City, S. J. & C. B. R.R. Co. v. Simpson* (1883), 30 Kan. 645. The Court adopts in this case the rea-

soning of the Supreme Court of the District of Columbia in *Galt v. Adams Express Co.*, *supra*, and adds, "While the provision in a bill of lading or contract between the shipper and the carrier, that the latter will not be liable beyond a certain sum expressed in the contract, may be valid to limit the liability of the carrier as an insurer, a condition of this character which seeks to cover the negligence of the carrier is void."

In *Kentucky*, the same rule has been followed: *Orndorff v. Adams Express Co.* (1867), 3 Bush. (Ky.) 194.

[In *Little et al v. Boston & Maine RR.* (1876), 66 Me. 239, the Court say: "When the article is of an extraordinary or unusual value the carrier would well be entitled to a higher rate of compensation, inasmuch as he might be reasonably held to a greater degree of care. * * It seems that common carriers may limit their liability by notice brought home to the owner of goods before, or at the time of their delivery, and expressly or impliedly assented to by him."

[The case *Brehme v. Adams Express Co.* (1866), 25 Md. 328, shows that in that State a carrier may by special contract limit the amount of his liability, for there the Court said, "The receipt executed by the appellee [the company] and accepted by the appellant, constituted the contract between the parties and both upon reason and authority, they are bound by its terms. The contents and value of the parcel were not disclosed to the appellee, and it was expressly agreed that its value was fifty dollars. Like in a valued policy of insurance, to which the

contract in question is analogous, the amount of risk assumed by the appellee was fixed by the agreement, and must, in case of loss, be the measure of the appellant's recovery."

In *Massachusetts*, the rule is in direct accordance with that established by the United States Supreme Court: *Squire v. New York Central RR. Co.* (1867), 98 Mass. 239; *Graves v. Lake Shore & M. S. RR. Co.* (1884), 137 Id. 33. In the latter case the Court (MORTON, C. J.) say: "The plaintiffs voluntarily entered into the contract with the defendant; no advantage was taken of them; they deliberately represented the value of the goods [high wines] to be \$20 per barrel. The compensation for carriage was fixed upon this value; the defendant is injured and the plaintiffs are benefited by this valuation, if it can now be denied. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect effects of such a contract is to limit the extent of the responsibility of the carrier for the negligence of his servants, this was not the purpose of the contract. We cannot see that any considerations of a sound public policy require that such contracts should be held invalid, or that a person who in such contract fixes a value upon his goods which he entrusts to the carrier, should not be bound by his valuation." These cases were expressly affirmed in *Hill v. Boston, H. T. & W. RR. Co.* (1887), 144 Mass. 284.

[In *Michigan*, the Revised Statutes (ed. 1882, pages 843, 879), provide: "§ 3328, Any railroad company organized under this act, receiving freight for transportation, shall be entitled to the rights and

be subject to the liabilities of common carriers, except as herein otherwise provided; but no company shall be suffered to lessen or abridge its common law liability as a common carrier, unless by an agreement to be signed by both parties thereto."

"§ 3418. That no railroad company shall be permitted to change its common law liability as a common carrier, by any contract, or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods or property to be carried." This last provision is contained in ch. 92, of Howell's Annotated Statutes (ed. 1882, page 879), and from its heading would seem to apply to Railroad Companies in general, and not like the previous section to those organized under the Statute therein referred to. The section is headed "Liability of Railroad Companies as Common Carriers."

The *Minnesota* Supreme Court is apparently in accord with the principal case, intimating, however, that an agreement made in good faith to liquidate the damages recoverable in case of loss through the carrier's negligence, would be enforced. In *Moulton v. St. Paul, M. & M. Ry. Co.* (1883), 31 Minn. 85, that Court said: "The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence, stand also in the way of any arbitrary preadjustment of the measure of damages, where the carrier is *partially* relieved from such liability. It would indeed be absurd to say that the requirement of the law as to such responsibility of the car-

rier is absolute, and cannot be laid aside, even by the agreement of the parties, but that one-half or three-fourths of this burden, which the law compels the carrier to bear, may be laid aside, by means of a contract limiting the recovery of damages to one-half or one-fourth of the known value of the property. This would be mere evasion, which would not be tolerated. Yet there is no reason why the contracting parties may not, in good faith, agree upon the value of the property presented for transportation, or fairly liquidate the damages recoverable in accordance with the supposed value. Such an agreement would not be an abrogation of the requirements of the law, but only the application of the law as it is, by the parties themselves, to the circumstances of the particular case. But that the requirements of the law be not evaded, and its purposes frustrated, contracts of this kind should be closely scrutinized."

[In this case, the general regulation attached to the contract, provided that the company should not be liable beyond one hundred dollars per head on horses and valuable live-stock, except by special agreement. This clause, the Court stated, "is plainly opposed to the law as established, so far as regards the negligence of the carrier. As a regulation, it is, therefore, of no effect. The law declares that the carrier shall be liable to the full extent of the value of the property, although there be no special agreement."

The Supreme Court of *Mississippi* has recently passed upon the question under consideration, taking its stand in direct accordance with the doctrine of the principal

case: *Southern Express Co. v. Seide*, S. Ct. Miss., June 2, 1890. The Court say in this case: "Stipulations in contracts with common carriers of similar import with that under consideration have frequently been presented to the Courts for decision, and it is very generally held that their effect is to exempt the carrier from a greater responsibility, only when the loss occurs without the negligence or fault of the carrier; but where the loss springs from negligence, the full value may be recovered, notwithstanding the stipulation." To the same effect are the earlier cases of *Southern Express Co. v. Moon* (1863), 39 Miss. 822, and *Chicago, St. L. & N. O. RR. Co. v. Abels* (1883), 60 Id. 1017.

In *Missouri*, the question under discussion was considered in *Harvey v. Terre Haute & I. RR. Co.* (1881), 74 Mo. 538, where the Court said: "We do not regard a contract limiting a right of recovery to a sum expressly agreed upon by the parties as representing the true value of the property shipped, as a contract in any degree exempting the carrier from the consequences of its own negligence. Such a contract fairly entered into, leaves the carrier responsible for its negligence, and simply fixes the rate of freight and liquidates the damages. This we think it is competent for the carrier to do."

[In the more recent case of *McFadden v. The Missouri Pacific Ry. Co.* (1887), 92 Mo. 343, the bill of lading stipulated that the defendant should not be liable for more than one hundred dollars per head for the mules, which were carried at a reduced rate. Here RAY, J., after commenting upon and examining *Hart v. Pennsylvania RR.*,

supra, *Moulton v. St. Paul M. & M. Ry. Co.*, *supra*, and *U. S. Express Co. v. Backman*, *infra*, remarks: "Even under the rule declared in the former [*Hart v. Pennsylvania*] class of decisions, these provisions thus employed and resorted to by common carriers to restrict their liability, are to be tested by their fairness, justice and reasonableness.

* * The reduced rate, if such it was, was the consideration for the exemption from liability beyond the one hundred dollars, even in case of injury and loss from the defendant's negligence." In distinguishing the case from *Hart v. Pennsylvania RR.*, he says: "In [that case] * * the discussion was had upon the terms of the bill of lading alone, and as the Court say, 'without any evidence upon the subject, and especially in the absence of evidence to the contrary,' and under the qualifications it contains, we cannot regard it as controlling authority in a case where the evidence clearly shows absence of reduced or lower rate, or any graduation of compensation to the valuation. On the one hand it may be, as is there said, unjust, unreasonable, and repugnant to sound principles of fair dealing, for the shipper to reap the benefits of a contract, by which he secures a lower rate than the carrier might reasonably charge for the service rendered, if there be no loss, and to repudiate it in case of loss. Where the shipper procures the lawful rates of the carrier to be reduced in express consideration of the agreed value, upon which the compensation is based, he is, under numerous authorities, * * held to be estopped to say the value is greater when the loss occurs. On

the other hand, it would, we think, be no less unfair, unreasonable and unjust that the carrier, without any sacrifice of his interests, or lawful demands, or diminution of his lawful charges, should secure, without any consideration therefor, such important advantages and release of liability to which he would otherwise be subjected under the law."

[The Compiled Statutes of *Nebraska* (ed. 1889) provide—"SEC. 111. Any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers. And whenever two or more railroads are connected together, the company owning either of said roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight to the consignee of said freight, in the same order in which such freight was shipped."

[Ch. 72, Id. page 628, provides, "SEC. 5, No notice either express or implied, shall be held to limit the liabilities of any railroad company as common carriers, unless they shall make it appear, that such limitation was actually brought to the knowledge of the opposite party and assented to by him or them, in express terms, before such limitation shall take effect."

[In Article XI. of the Constitution of this State it is provided, *inter alia*, by SEC. 4, "The liability of railroad corporations as common carriers, shall never be limited." In *The Atchison & Nebraska RR. Co. v. Washburn & Leiby* (1876), 5 Neb. 117, the Court held an agreement limiting the car-

rier's liability to be "in violation of law and against public policy," and could "not lessen the plaintiff's responsibility as common carrier, nor remove its liability for negligence of its servants."

[Two cases have very recently been decided in the Supreme Court of *New Hampshire* upon this question, *Duntley v. Boston & M. RR.*, July 26, 1890; and *Durgin v. American Express Co.*, July 25, 1890; they follow the rule as laid down in *Hart v. Pennsylvania RR. Co.*, *subra*.

[In *New Jersey*, the rule as laid down in *Hart v. Pennsylvania RR. Co.*, *supra*, is followed: *The Lydian Monarch* (1885), D. Ct., D. N. J., 23 Fed. Repr. 298.

[The question was raised in *New York*, in the case of *Magnin et al. v. Dinsmore* (1874), 56 N. Y. 168, where the receipt contained, *inter alia*, the following clause: "It is further agreed, and is part of the consideration of this contract, that the Adams Express Company are not to be held liable or responsible for the property herein mentioned for any loss or damage arising from the dangers of railroad, ocean, steam, or river navigation, leakage, fire, or from any cause whatever, unless specially insured by them and so specified in this receipt; which insurance shall constitute the limit of the liability of the Adams Express Company in any event; and if the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to the property aforesaid." JOHNSON, J., who delivered the opinion of the Court, said; "The first question which

arises in this case is as to the meaning of the contract under which the plaintiffs claim to recover against the defendants; for it is no longer open to question, in this State, that in the absence of fraud or imposition, the rights of carrier and shipper are controlled by contract, in writing, delivered to the shipper by the carrier, at the time of the receipt of property for transportation." But in concluding he adds, "The terms of these contracts are very much under the control of the carriers, and they may justly be required to express in plain terms the entire exemption for which they stipulate. * * If it be desired to cover losses by negligence, it is not too much to say that the purpose must be clearly expressed." The next case in which this question was raised, was *Steers v. The Liverpool, New York and Philadelphia Steamship Co.* (1874), 57 Id. 1, which directly followed the ruling of the Court in *Belger v. Dinsmore*, *infra*. In *Westcott et al. v. Fargo, President, etc.* (1875), 61 Id. 542, the Court referring to the cases above mentioned, said: "This point must now be regarded as settled by recent decisions in this Court [The Commission of Appeals] and in the Court of Appeals. The result of these cases is, that it is lawful for a carrier to make such a contract as was entered into in the present case, exempting him from liability and that he may, by *clear and distinct expressions*, relieve himself from losses occasioned by his own negligence. On the other hand, general words, 'such as that he will not be liable for loss, or detention, or damage,' are not to be construed to extend to losses, etc., occasioned by negligence." In *Magnin v.*

Dinsmore 1877, 70 Id. 410, ALLEN, J., says: "The act which will deprive of the benefit of a contract for a limited liability fairly made, must be an affirmative act of wrong doing, not merely ordinary neglect in the course of the bailment. It need not necessarily be intentional wrong doing, but the mere omission of ordinary care in the safe keeping and carriage of the goods is not the misfeasance intended by the authorities."

[To the same effect is the earlier case of *Belger v. Dinsmore* (1872), 51 Id. 166, where the receipt given limited the defendant's liability to fifty dollars unless otherwise expressed, and the Court held that "a party accepting such an instrument * * declares his assent by such acceptance, to those terms and conditions."

[In *North Carolina*, the rule is established that a common carrier being an insurer against all losses and damages, except those occurring from the act of God or the public enemy, may by special notice brought to the knowledge of the owner of goods delivered for transportation, or by contract, restrict his liability as an insurer, where there is no negligence on his part. He cannot by contract even limit his responsibility for loss or damage resulting from his want of the due exercise of ordinary care. A contract restricting the liability of the carrier must be reasonable, and not calculated to ensnare or defraud the other party. *Capehart v. Seaboard & Roanoke R.R. Co.* (1879), 81 N. C. 438. Here the bill of lading stipulated that in case of any claim for damages to the articles mentioned therein, the extent of such damage should be adjusted before the removal from

the station, and claim therefor made in thirty days, and the Court held it unreasonable. In every case, the restriction must be brought to the knowledge of the consignor, and a restriction in a bill of lading given at the time of the delivery of the goods, and received by the shipper without remonstrance or objection, is equivalent to an express contract: *Whitehead v. Wilmington & Weldon RR. Co.*, 87 N. C. 255. In *Weinberg v. Albemarle & Raleigh RR. Co.* (1884), 91 Id. 31, the Court said, "the bill of lading was evidence of a contract between the plaintiff and defendant, and the former is bound by all the stipulations therein that were lawful and did not contravene public policy in respect to common carriers."

The Ohio Supreme Court is in full accord with the Pennsylvania cases. The question under consideration arose in *U. S. Express Co. v. Backman* (1875), 28 Ohio St. 144, where the Court said: "The Ohio cases hereinbefore cited make it clear that common carriers cannot, by contract, exempt themselves from liability for full damages for a loss occasioned by their own negligence or that of their servants. No more can they legally stipulate for a partial exemption from liability caused by like negligence. The public policy that avoids a contract for total exemption; will hold a contract void that provides for partial exemption in such case. The fact that by reason of such contract the carrier undertook the transportation of the goods for a diminished reward will avail him nothing."

[The General Statutes (ed. 1882, p. 389) of *South Carolina* provide—"§ 1333. No public notice

or declaration shall limit or in any wise affect the liability at common law of any public common carriers for or in respect of any goods to be carried and conveyed by them; but they shall be liable, as at common law, to answer for the loss of or injury to any articles and goods delivered to them for transportation, any public notice or declaration by them made and given contrary thereto or in anywise limiting such liability notwithstanding." Under this section the case of *Piedmont Manufacturing Company v. Columbia & Greenville RR. Co.* (1882), 19 S. C. 353, held "that common carriers in this State cannot limit their common law responsibility by any * * special contract for or in respect of any goods to be carried by them."

In *Tennessee*, the question of the effect of contracts containing a stipulated valuation has recently been elaborately considered in the case of *Louisville & N. RR. Co. v. Wynne*, S. Ct. Tenn., Jan. 2, 1890. After stating the general rule that "common carriers may limit their liability by special contract, provided always, that such limitation shall not operate to exempt them from the consequences of their own negligence, or that of their servants," the opinion of the Court in this case goes on to say: "Is the limitation in the contract before us within the prohibition of this eminently just and generally accepted principle? Manifestly the stipulation does not contemplate total exemption from liability; it only provides for partial or limited exemption. Upon that distinction, the nice and important question arises, can a stipulation of the latter character stand before the law when one of the former kind

cannot? Or, to state the same question differently, and so as to apply it more directly to the facts of this case, the rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it would in no event be liable for any part of the value of the mare, if lost or destroyed, can the limitation of its liability to \$100 be upheld in the courts, if it should appear that her death resulted from the negligence of the company, and that she was in fact worth eight times that amount, as the jury found her to be? We unhesitatingly answer, 'No.' The carrier cannot by contract excuse itself from liability for the whole nor any part of a loss brought about by its negligence. To our minds it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so, the same considerations of public policy operating in each case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say, that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-hundredths of the loss so occasioned. With great unanimity the authorities say that it cannot do the former. If allowed to do the latter, it

may thereby substantially evade and nullify the law, which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation by stipulation for exemption in whole or in part from the consequences of its negligent acts. This view is sustained by sound reason, and also by the weight of authority." The Court attempts, however, in a subsequent portion of the opinion, to distinguish this case from *Hart v. Pennsylvania R.R. Co.* (1884), 112 U. S. 331, for the reason that in the latter case "there was an agreed valuation stated in the contract as the basis of the carrier's charges and responsibility, and the Court very properly held that in such cases, the shipper was estopped to claim a greater sum than the agreed valuation. Though evident from the reasoning in the body of the opinion in the Hart Case, which may now be called the leading case in America, the Court is careful to say, in conclusion, that the decision is based alone upon the ground above stated." The stipulation in the Tennessee case was as follows: "And it is further agreed that should damage occur for which [the carrier] may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed" a specified sum. The distinction appears to be drawn from the fact that no abatement of freight charges was made in consideration of this stip-

ulation, and the Court intimates that, had such been the case, it would have followed the ruling in the Hart Case. Such a course would, however, seem inconsistent with the reasoning just quoted.

The Tennessee Supreme Court expressed the same view of the law in *Coward v. East Tennessee, V. & G. RR. Co.* (1886), 16 Lea 225.

[In *Texas*, the Civil Statutes (vol. 1, ed. 1888) provide: "ART. 278, Railroad companies and other common carriers of goods, wares and merchandise, for hire, within this State, on land, or in boats or vessels on the waters entirely within the body of this State, shall not limit or restrict their liability as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid." In the case of *M. P. Ry. Co. v. Barnes & Co.* (1885), 2 Texas App. C. C. 507, the bill of lading stipulated that in the event of the loss of the property, "the value or cost of the same at the point of shipment" should govern the settlement, and the Court gave judgment for the market value of the goods, which was greater than the cost of the same.

[In *Vermont*, it would seem that the carrier may by an express contract limit his liability. "The express contract," says REDFIELD, J., "ought, perhaps, to be very clearly proved, and in water carriage is usually required to appear in the bill of lading. But a mere general notice, when brought to the knowledge of the owner, ought not, per-

haps, to have that effect, unless there is very clear proof, that the owner expressly assented to that, as forming the basis of the contract: " *Farmers & Mechanics' Bank v. Champlin Transportation Co.* (1851), 23 Vt. 186. To the same effect, *Mann et al. v. Richard et al.* (1867), 40 Id. 326.

[The question of the right of a common carrier to limit his liability is provided for by the Code of Virginia which provides: "SEC. 1296, No agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct, shall be valid." The case of *Virginia and Tennessee RR. Co.* (1875), 26 Gratt. (Va.) 328, further supports the doctrine that a common carrier cannot by express contract relieve himself from liability in any degree from want of care or faithfulness in himself or his agents.

[In *Richmond & Danville R. Co. v. Payne*, decided in the Supreme Court of Appeals of Va., January 30, 1890, there was a special contract in the bill of lading for the carriage of horses at a reduced rate, and the amount to be claimed in case of loss was limited to one hundred dollars a horse. The Court said: "There is no doubt that a common carrier cannot lawfully stipulate for exemption from liability for the consequences of his own negligence or that of his servants. * * But that is not the question before us. The question here is whether, when a shipper signs a bill of lading, not exempting the carrier from liability for the negligence of himself or his servants, but limiting the amount in which the carrier shall be liable, in consideration of the goods being carried at reduced rates, such a con-

tract, fairly entered into, is valid and binding; and we see no reason why, when its terms are just and reasonable, it should not be. The test to be applied in all such cases is, Was the contract fairly entered into, and are its terms just and reasonable?" After examining the authorities and especially *Hart v. Pennsylvania, supra*, the Court continued: "This reasoning [*Hart v. Pennsylvania*], which seems to us sound, is supported by numerous decisions of courts of the highest respectability, and is decisive of the present case."

In *Wisconsin*, it has been held that the carrier cannot by special contract limit the amount of his liability, except in case of loss without fault upon his part: *Black v. Goodrich Transportation Co.* (1882) 55 Wis. 319.

The English case of *Manchester, S. & L. Ry. Co. v. Brown* (1883), L. R. 8 App. Cases, 703, cited by MITCHELL, J., in his dissenting opinion, was upon the general question of the power of a carrier to protect himself by special contract from the results of his and his servants's negligence, and was decided under the Railway and Canal Traffic Act of 1854 (17 and 18 Vict. c. 31, sect. 7), which provided that "every such company shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby

declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable. * * * Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively for carriage." In the opinion of Lord BLACKBURN, however, the view is expressed that, irrespective of the Act, a carrier might by special contract, if fair and reasonable, protect himself from the negligence of his servants (p. 709). The English authorities on the general question are fully cited in this case, and in *Peck v. North Staffordshire Ry. Co.* (1863), 10 H. L. C. 473.

[In conclusion, it may be asked: Shall an agreed valuation limit the common law liability? and if so, how far shall printed or other notice of the terms upon which the carrier will transport the goods, be considered as agreed to?

[The first question receives a negative answer in *Colorado* (777-8). *District of Columbia* (779). *Illinois* (779), *Iowa* (782) by Statute, *Kansas* (782), *Kentucky* (783), *Mississippi* (784-5), *Nebraska* (786), *Ohio* (788), *Pennsylvania* (766, 771), *South Carolina* (788), *Tennessee*

(788) and Texas (790) by Statute: that is, in twelve States and one District. The Supreme Court of the United States answers this first question affirmatively (774), as do the Courts of Alabama (775), Arkansas (776), California (777) by the Civil Code, Connecticut (778), Dakota (778) under the Civil Code, Georgia (779) under the Code, Indiana (781), Maine (783), Massachusetts (783), Michigan (783) by Statute, Minnesota (784), Missouri (785), New Hampshire (786), New Jersey (786), New York (786), North Carolina (787), Vermont (790), Virginia (790), and Wisconsin (791): that is, twenty other States, counting Dakota as two, and the Supreme Court of the United States.

[So that the greater number of jurisdictions, as well as the better and more modern reasons, favor the views of the dissenting judge in the principal case. This renders

an examination of the second question of greater moment. This second question growing out of the first, must be answered negatively in all cases where the agreed valuation does not limit the damages. Where the first question is answered affirmatively, the second does not necessarily receive a similar answer. So far as the circumstances of the cases have brought this subject to the attention of the judges, or the statutes have provided, there has been a declaration that express, special notice shall be considered as agreed to, in California (*supra*, page 777), Maine (783), New York (786), and North Carolina (787); but the consignor or consignee, is not bound by notice, nor except by his express agreement, in Dakota (*supra*, page 778), Georgia (779), Michigan (783), Minnesota (784), Missouri (785), and Vermont (790).

JAMES C. SELLERS.

ABSTRACTS OF RECENT DECISIONS.

BANKS AND BANKING.

The restrictive indorsement on a draft left with a bank for collection, is notice to the bank actually making the collection that the first bank is merely an agent to collect, and therefore the collecting bank can not acquire any better title to the draft, or its proceeds, than the first bank had: *Peck et al. v. First Nat. Bank*, U. S. C. Ct., S. D. N. Y., May 22, 1890.

BILLS AND NOTES.

One who buys a promissory note made for a valuable consideration, payable "to the order of———" and fills in the blank, writing his own name therein, is a "subsequent holder" within the act of Congress determining the jurisdiction of the Circuit Courts of the United States, approved March 3, 1887, as corrected by the act of August 13, 1888, and cannot therefore sue thereon, the original holder and maker being in the State. Such a note is in effect payable to bearer: *Steel v. Rathbun*, U. S. C. Ct., D. Ore., May 23, 1890.

CONSTITUTIONAL LAW.

The boxes, in which bottles of whiskey, each sealed up and packed in uncovered wooden boxes furnished by the express company, marked "To be returned," shipped from one State to another, are

the "original packages" and not the bottles: *In re Harmon*, U. S. C. Ct., N. D. Miss., Aug. 6, 1890.

The business of running Pullman cars, run wholly within a State, is taxable as a privilege: Gibson Co. v. Pullman Smith Car Co., U. S. C. Ct., W. D. Tenn., April 28, 1890.

The trial and commitment of one who has already been tried and acquitted of the same offense is depriving him of his liberty "without due process of law" within the meaning of the 14th amendment of the Constitution of the United States: Ex parte Ulrich, U. S. D. Ct., W. D. Mo., June 23, 1890.

COPYRIGHT.

There is no infringement of copyright in a picture, where the two are dissimilar, the attitude, general expression, and general appearance of the two figures unlike, and different, the variations being more than colorable: Munro v. Smith et al., U. S. C. Ct., S. D. N. Y., May 5, 1890.

COSTS.

The costs of printing the bill, subsequent pleadings and other documents in a suit in the Circuit Court of the United States, cannot be taxed, there being no rule, and the fee-bill (Section 823, Rev. Stat.) being silent thereon, even though there be an agreement between counsel to tax the same: Lee v. Simpson, U. S. C. Ct., D. S. C., June 11, 1890.

CRIMINAL LAW.

One, who pleads not guilty, and is put upon his trial for a felony, evidence being introduced by the State, and the case adjourned for the trial of another, and the jury discharged on such adjourned hearing by the judge on the ground of his own ill health without the prisoner's consent, cannot be again tried for the same offense, the discharge being equivalent to an acquittal: Ex parte Ulrich, U. S. D. Ct., W. D. Mo., June 23, 1890.

FRAUDULENT CONVEYANCE.

A Conveyance of land by a debtor to his wife presumed in satisfaction of a debt due by him to her, but really with the intention of preserving it from his creditors, and with an agreement to execute a mortgage for his benefit, is void: Marshall v. Whitney et al., U. S. C. Ct., D. Ind., July 30, 1890.

INJUNCTION.

Joint suit for an injunction will not be sustained where persons have been separately indicted for the sale of intoxicating liquors in the original packages, and separately enjoined from making such sales, even though they are agent and sub-agent of the importer: Woolstein et al., v. Welch, U. S. C. Ct., D. Kans., July 18, 1890.

INSURANCE.

An action lies against an insurance company for loss by fire where it has brought action before and recovered its premiums after a fire has occurred, even though the policy provides, "In case the assured fails to pay the premium note, this policy shall cease, and remain void during the time said note remains unpaid after its

maturity, and no legal action on the part of this company shall be construed as reviving the policy. The payment of the premium, however, revives the policy, and makes it good for the balance of its term:" *Phoenix Ins. Co. v. Tomlinson et al.*, S. Ct. Ind., Sept. 18, 1890.

A baggage checker of a transfer company, who lives in one place, whose business it is to meet and board trains, and check baggage to other lines, is a railroad employe within the meaning of the following condition in an accident policy: "This insurance does not cover entering, or trying to enter or leave a moving conveyance using steam as a motive power * * * railroad employes excepted:" *Cotten v. Fidelity & Casualty Co.*, U. S. C. Ct., S. D. Miss., January 17, 1890.

Warehousemen have an insurable interest in cotton insured by them in their own name and can recover therefor under a policy which provides, "cotton in bales, their own, or held by them in trust, or on commission, or on joint account with others, or sold but not delivered," although the cotton was owned by another and the fact was not disclosed: *Pelzer Manufg Co. v. St. Paul Fire & Marine Ins. Co.*, U. S. C. Ct., S. C., Feby. 4, 1890.

INTERSTATE COMMERCE.

An express company engaged in business as an independent concern, for its own profit, is not subject to the provisions of the interstate commerce act as construed by the commission: *United States v. Morsman*, U. S. D. Ct., E. D. Mo., May 21, 1890.

An indictment which does not show that such company is a mere adjunct or bureau of a railroad company or combination of railroad companies, does not bring the company within the act: *Id.*

Injunction will lie in equity to restrain proceedings by a prosecuting attorney to prevent the agents of non-resident importers selling liquors in the original packages, where the State law is a violation of the interstate commerce clause of the Constitution, such proceedings being an interference with property rights under the Constitution, Rev. Stat. U. S. § 1979, giving the right of action at law or suit in equity: *Schandler Bottling Co. v. Welch et al.*, U. S. C. Ct., D. Kans., July 18, 1890.

Small packages of liquor in any form or size may be sold by the importer or his agent in a prohibition State, the size of the package being of no consequence; and an agent imprisoned for making sales in such original package will be released on *habeas corpus*, the Kansas Laws being in contravention of the interstate commerce clause of the Constitution: *In re Beine*; *In re Jockheck et als.*, U. S. C. Ct., D. Kans., June 14, 1890.

JURISDICTION.

The State authorities have jurisdiction over a United States marshal arrested, while on his way to serve process of the United States commissioner, under State authority for forgery, it not appearing that his arrest was for an act done pursuant to federal authority, or with intent to interfere with the service of such process: *In re Miller*, U. S. D. Ct., E. D. S. C., May 10, 1890.

NATURALIZATION.

Cancellation of a certificate or decree of naturalization will be decreed in a federal court at the suit of the United States, where such certificate has been obtained by fraud in a State Court: United States v. Morsch, U. S. C. Ct., E. D. Mo., June 12, 1890.

NEGLIGENCE.

It is negligence for a sailing vessel to use a fog-horn sounded by the breath, instead of, by bellows as directed by article twelve of the sailing regulations: The Catalonia, The Rebecca A. Taulane: U. S. D. Ct., D. Mass., Aug. 18, 1890.

It is negligence for a vessel to run at the rate of seven knots an hour in a frequented part of the ocean, and in a fog so thick that a ship's hull and sails can not be seen hardly more than a ship's length distant: Id.

It is contributory negligence for a person, knowing a fast train is due, to get on the track, and he cannot recover should an accident occur: Farve v. Louisville & N. R. Co., U. S. C. Ct., S. D. Miss., March 7, 1890.

PARTNERSHIP.

Where a surviving partner, under an attachment issued in a suit brought by him for a partnership debt, purchases real estate at the sheriff's sale, such property is not partnership real estate descendible to the heirs of the deceased partner, but may be converted into personal property by sale by such surviving partner: Bright et al. v. Land & River Imp. Co. et al., U. S. C. Ct., W. D. Wis., June 6, 1890.

PATENTS.

A license to use a patent cannot be revoked by the licensor, where the license does not contain a power of revocation, without the consent of the licensee. The licensor's only remedy is by action at law for breach of contract: Chase v. Cox, U. S. C. Ct., E. D. Pa., Jan. 19, 1890.

PRACTICE.

Service of writ by publication may be had on a non-resident, in a suit to establish a trust in real estate, even though the bill also prays an account and other relief: Porter Land & Water Co. v. Baskin, U. S. C. Ct., S. D. Cal., Aug. 8, 1890.

RAILROADS.

The speed of trains is in the discretion of a railroad company, when such trains are not passing through an incorporated city or town, or crossing a public street or highway, and the engineer in such case is not bound to look out for persons on the track: Farve v. Louisville & N. R. Co., U. S. C. Ct., S. D. Miss., March 7, 1890.

REMOVAL OF CAUSES.

Causes may be removed from the State to the Federal Courts on the ground of local prejudice under the Act of March 3, 1887, the amount being over five hundred, but less than two thousand, dollars: Frishman v. Insurance Cos., U. S. C. Ct., D. Kans., March 14, 1890.

Where some of the defendants are residents and others non-residents of the State, a cause, wherein there is only a single controversy, cannot be removed from a State to a Circuit Court under the second section of the act of 1887: Arkansas Valley Smelting Co. v. Cowenhoven et al., U. S. C. Ct., D. Colo., March 6, 1890.

STATUTE OF FRAUDS.

The Statute does not apply to an agreement to support a child until he is of age; it not being an agreement "not to be performed within a year," as the child might die within the year: Wooldridge v. Stern, U. S. C. Ct., W. D. Mo., May 5, 1890.

TRADE-MARKS.

An infringement is made out where the defendants have so placed numbers and words, indicating sizes and quantities, in similarity to those on the orator's labels, as to lead in the direction of the conclusion that methodical imitation was intended, even though defendant use the words "Warranted Hose Supporter" for "Warren Hose Supporter": Frost et al. v. Rindskopf, U. S. C. Ct., E. D. N. Y., April, 1890.

Jurisdiction cannot be had in the circuit court of a bill for infringing trade-marks used in foreign commerce under Act of Congress March 3, 1881, both parties residing in the State, and there being no evidence that the trade-mark is used in foreign commerce: Graveley et al. v. Graveley et al., U. S. C. Ct., W. D. Va., April 19, 1890.

The words "Warren Hose Supporter" used in connection with a cut of a hose supporter connected with a stocking, and placed as labels on boxes containing hose supporters, are entitled to protection as a trade-mark, being more than merely descriptive, and sufficiently arbitrary to denote fairly the origin of the goods: Frost et al. v. Rindskopf et al., U. S. C. Ct., E. D. N. Y., April, 1890.

WITNESS.

A witness who is not a party to a suit against executors is competent to give evidence as to transactions between his testator and himself, under section eight hundred and fifty-eight of the Revised Statutes of the United States even though he is interested in the result of such action: Stephens v. Bernays, U. S. D. Ct., E. D. Mo., June 7, 1890.

ERNEST WATTS.

THE AMERICAN LAW REGISTER.

DECEMBER, 1890.

THE LAW GOVERNING AN ORIGINAL PACKAGE.

(Concluded from November Number, *ante*, page 765).

XIX.

The preference of the ports of one State over those of another is forbidden to Congress and not to the States, which are prevented by the commerce clause and not the ninth section of the First Article of the Constitution.

The discrimination between States, and not individual ports, is forbidden to Congress, and therefore incidental advantages can be given to a port in the due exercise of the regulation of commerce.

Until Congress makes some regulation of the charges for the use of grain elevators and such other instruments of interstate commerce as are situate wholly within a State, licenses and charges may be prescribed by that State as matters of local regulation.

While the especial law governing the instruments of interstate commerce must be passed over, one of the *Granger Cases* should be examined briefly on another question of license, and this by the State and not by the United States.

Munn v. The People of the State of Illinois (1877) 4 Otto (94 U. S.) 113, began by an information filed June 29, 1872, by the State's attorney of the seventh judicial circuit of the State of Illinois, against Ira V. Munn and George L. Scott, for transacting in the City of Chicago, the business of

public warehousemen, without the license required by the State law of April 25, 1871 (Laws, page 762). It is unnecessary to go further in the details of this case than add that the defendants were convicted in the Criminal Court of Cook County, July 6, 1872, and that this conviction was affirmed in the State Supreme Court, January 30, 1874, on an opinion by Chief Justice BREESE: (69 Ill. 80). MCALLISTER and SCOTT, JJ., dissented, among other reasons, because such licenses were regulations of interstate commerce, the former putting the case thus:—

The Chicago River, running West from its connection with Lake Michigan about a mile, and then dividing into two branches, one North and the other South, running through the City, forms the port of Chicago. The warehouse in question, and probably all others at which this statute was aimed, are situated upon this port, and constitute the direct and indispensable accessions to commerce in grain upon the great lakes, between that port and other States, and the question arises, can these accessions to such commerce be suppressed by the State government? * * * The Act was not necessary for the preservation of the health, the morals, or the safety of the community, which are the true purposes of the police power; but its purpose was to compel the warehousemen to conduct their business upon a compensation prescribed by the State: (69 Ill. 101, 103).

The judgment was then removed to the Supreme Court of the United States, and there finally affirmed, March 1, 1877, on an opinion by Chief Justice WARRE, denying the repugnancy of the Illinois Act (1) to the Fourteenth Amendment, because private property when devoted to public use, is subject to public regulation; (2) to the preference clause of the First Article (*supra*, page 424), or (3) to the commerce clause (*supra*, page 420,) as to which latter, the words of the opinion were:—

It was very properly said in the case of the *State Tax on Railroad Gross Receipts* (1873), 15 Wall. (82 U. S.) 293, that "It is not every thing that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated, and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in the State, as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one

railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern and certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing, it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done: WAITE, C. J., *Munn v. Ill.* (1877), 4 Otto (94 U. S.) 113, 135.

While the authority of *Munn v. Illinois* may be considered as shaken, by *Chicago, M. & St. P. RR. Co. v. State of Minnesota* (1890), 134 U. S. 418, so far as the interpretation of the due process of law secured by the Fourteenth Amendment, the interpretation of the State's right to regulate commerce appears to be so conformable to the general principle of *Cooley v. Port Wardens* (*ante*, page 466), and *Wilson v. The Marsh Co.* (*ante*, 445), that it is sound law upon a subject of great importance, notwithstanding the manifest error of the Chief Justice in comparing grain elevators with carts and drays, and thus overlooking their storage capacity. In this respect, *Munn v. Illinois* has been recognized by Justice LAMAR, in *Kidd v. Pearson* (1888), 128 U. S. 1, 23;—Chief Justice WAITE himself, in *Hall v. De Cuir* (1878), 5 Otto (95 U. S.) 485, 487;—Justice BRADLEY, in *Phila. & S. M. Steamship Co. v. Pa.* (1887), 122 U. S. 326, 346, adding that *Munn v. Illinois* was explained upon this point by the decisions in *Wabash, St. L. & P. RR. Co. v. Illinois* (1886), 118 U. S. 557, 564, 594, and *supra*, pages 762, 537 (where the State was not allowed even to prevent discrimination in interstate transportation); the wharfage cases (where the fees were allowed, *infra*, page 817, only when imposed in good faith and for fair remuneration, the subject not requiring a single, uniform, rule), that is; *Kcokuk N. L. Packet Co. v. Kcokuk* (1877), 5 Otto (95 U. S.) 80, affirmed in *Northwestern Union Packet Co. v. St. Louis* (1880), 10 Otto (100 U. S.) 423 (as observed by Justice MILLER, in *Edye v. Robertson* (1884), 112 U. S. 580, 596, and *supra*, page 466), which latter case was fol-

lowed in *Vicksburg v. Tobin* (1880), 10 Otto (100 U. S.) 430; *Cincinnati, P. B. G. & P. Packet Co. v. Callettsburg* (1882) 15 Otto (105 U. S.) 559; *Parkersburg & Ohio River Transp. Co. v. Parkersburg* (1883), 17 Otto (107 U. S.) 691 and *supra*, pages 762, 508, 533; and generally, *Ouachita & Miss. R. Packet Co. v. Aiken* (1887), 121 U. S. 444; *Mobile County v. Kimball* (1881), 12 Otto (102 U. S.) 691, (where Justice FIELD explained the divergence of views formerly existing among the Justices, as due to their not always keeping in mind the distinction between commerce and the local aids, instruments or measures for the improvement of commerce; the controlling principle being that of *Coolcy v. Port Wardens*, *supra*, page 466, as pointed out by Justice MATTHEWS, in *Bowman v. Chicago & N. W. RR. Co.*, 1888, 125 U. S. 465, 485); *Brown v. Houston*, *supra*, page 732; *Coc v. Errol*, *infra*, page 821.

It is, of course, outside of the present subject to do more than add here that commerce within a State has been emphatically relegated to State regulation alone by such decisions as *The Railroad Commission Cases* of *Stone v. Farmers L. & T. Co.* (1886) 116 U. S. 307; and *Louisville, N. O. & Texas RR. Co. v. Mississippi* (1890) 133 Id. 587.

That the preference clause (*supra*, page 424) affected the powers of Congress, and not of the States, was recognized as properly decided in *Munn v. Illinois*, by Justice BLATCHFORD, in *Johnson v. Chicago & P. Elevator Co.* (1886), 119 U. S. 388, 400, referring also to *Morgan v. La.* (1886), 118 Id. 455; 467. This had been pointed out as early as the *Passenger Cases* (1849), 7 How. (48 U. S.) 283, 414, by Justice WAYNE, and, not long after, with more precision, while sustaining an act of Congress authorizing a bridge, where it was pointed out that Congress could not even consider the expediency of common and equal privileges.

Thus much is undoubtedly embraced in the prohibition, and it may certainly also embrace any other description of legislation looking to a direct privilege, or preference of the ports of any particular State over those of another. Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by Congress, to this effect, and

not against any incidental advantage that might possibly result from the legislation of Congress upon other subjects connected with commerce, and confessedly within its power. Besides it is a mistake to assume that Congress is forbidden to give a preference to a port in one State over a port in another. Such preference is given in every instance where it makes a port in one State, a port of entry, and refuses to make another port in another State, a port of entry. No greater preference, in one sense, can be more directly given than in this way ; and yet the power of Congress to give such preference has never been questioned. Nor can it be, without asserting that the moment Congress makes a port in one State, a port of entry, it is bound, at the same time, to make all other ports, in all other States, ports of entry. The truth seems to be, that what is forbidden, is not discrimination between individual ports within the same or different States, but discrimination between States ; and if so, in order to bring this case within the prohibition, it is necessary to show, not merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania : NELSON, J., *Pu. v. Wheeling & B. Bridge Co.* (1856), 18 How. (59 U. S.) 421, 435.

XX.

A State cannot declare what produce of another State may be owned or possessed within its borders.

The Courts, and not the State legislatures, are the proper organs of government to decide whether quarantine or other preventative police regulations do not extend beyond the danger apprehended, into regulation of interstate commerce.

A State cannot exclude all cattle coming from another State, as the police power extends only to the exclusion of those diseased and fit for the restrictions of quarantine laws.

Where inspection of cattle must be made such a brief time before slaughter as to prevent the carriage of the carcasses from one State to another, this is a case where interstate commerce can only exist under general laws, passed by Congress, and State legislation is void.

Cases within the operation of State inspection laws, as well as those of quarantine, do not fall within the limits of this article, except the few recent ones where the suppositions advanced for the validity of the State laws require attention.

The first of these cases arose in 1873, before S. K. WHITE,
VOL. XXXVIII.—51.

Justice of the Peace for Kidder Township, Caldwell County, Missouri, by John T. Husen claiming damages of The Hannibal & St. Jo. RR. Co. for death of cattle by fever communicated by Texas cattle brought in by the defendants. This proceeding was under—

AN ACT to amend an Act entitled An Act to prevent the introduction into this State, of Texas, Mexican, or Indian cattle, during certain seasons of the year, approved February 26, 1869. (Approved January 23, 1872; Laws, pages 172-3.)

Be it enacted, etc. * * * SECTION 1. No Texas, Mexican, or Indian cattle shall be driven, or otherwise conveyed into, or remain in, any county of this State, between the first day of March and the first day of November in each year, by any person or persons whatsoever; *Provided*, That nothing in this section shall apply to any cattle which have been kept the entire previous winter in this State; *Provided further*, That when such cattle shall come across the line of this State, loaded upon a railroad car or steamboat, and shall pass through this State without being unloaded, such shall not be construed as prohibited by this Act; but the railroad company, or owners of a steamboat performing such transportation, shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of such transportation; and the existence of such disease along such route, shall be *prima facie* evidence that such disease has been communicated by such transportation.

The Justice gave judgment against the Railroad Company, which was affirmed on appeal to the State Circuit Court of Grundy County, and again on appeal, June 21, 1875, by the State Supreme Court (60 Mo. 226), upon the authority of *Wilson v. The Kansas City, etc., RR. Co.* (Id. 184). The State Court denied that the Constitutional provision had been infringed. After explaining that such cattle were liable, at certain seasons of the year, to communicate disease to native cattle, and the impossibility of selecting out the dangerous animals, the Court proceeded to state that—

The right of a State to enact such police regulations as are necessary to protect her citizens from contagious and dangerous disease, and to protect their property from calamity, or destruction, cannot be denied. Such regulations by a State are in no sense, an attempt to regulate commerce among the States. Such police powers were never delegated to Congress; and, indeed, could not be without a total surrender, on the part of the State, of the power to protect, or preserve her own citizens. Congress is not to be looked to by the citizens of a State for such police regulations as will protect themselves and their property from disease and consequent

destruction. These police regulations reside in the legislative power of the State, and their exercise is not in conflict with the provision of the Constitution referred to. And it makes no difference that such regulations, when adopted by the State for such a purpose, should incidentally, in some slight degree, affect the commerce carried on between citizens of different States (*Lewis v. Boffinger*, 1853, 19 Mo. 13; *City of St. Louis v. McCoy*, 1853, 18 Id. 238); *VORLES, J., Wilson v. RR. Co.* (1875), 60 Id. 197-8.

The learned Judge, in these sentiments, followed the Supreme Court of Illinois, in their decisions sustaining a similar law in that State; of which he cited *Yaczel v. Alexander* (1871), 58 Ill. 255; *Stevens v. Brown*, Id. 289; *Somerville v. Monks*, Id. 371; *Chicago & A. RR. Co. v. Gassaway* (1875), 71 Id. 570. This Illinois law was a model of brevity, as aside from three sections putting the first into force, it was—

AN ACT to prevent the importation of Texas or Cherokee cattle into the State of Illinois. (Approved, February 27, 1867; Laws, page 169).

SECTION 1. *Be it enacted, etc.*, That it shall not be lawful for any one to bring into this State, or own, or have in possession any Texas or Cherokee cattle.

The Missouri judgment was then removed to the Supreme Court of the United States, and there reversed on a unanimous opinion by Justice STRONG, because the statute in question did violate the commerce clause of the Constitution. In answer to the position taken by the State courts, the opinion proceeded:—

We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the State. We admit that the deposit in Congress, of the power to regulate foreign commerce and commerce among the States, was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. * * * * All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress, by the Federal Constitution. It cannot invade the domain of the national government: *STRONG, J., RR. Co. v. Husen* (1878), 5 Otto (95 U. S.) 465, 470, 471; S. C. 17 AMERICAN LAW REGISTER, 164.

That is, the statute was declared unconstitutional, because it embraced all cattle, even if free from disease : Chief Justice WAITE, dissenting in *Bowman v. Chicago & N. W. RR. Co.* (1888), 125 U. S. 465, 513; Justice GRAY, dissenting in *Leisy v. Hardin* (1890), 135 Id. 100, 153, and *supra*, page 537; Justice FIELD, *Kimmish v. Ball* (1889), 129 U.S. 217, 221.

In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us, have been sustained. [*supra*, page 803] Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and, whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce, or interstate commerce, beyond the necessity for its exercise; and under color of it, objects not within its scope, cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion : STRONG, J., *RR. Co. v. Husen* (1878), 5 Otto (95 U. S.) 465, 473-4; S. C. 17 AMERICAN LAW REGISTER, 164.

Before Husen's case began, the Illinois act (*supra*, page 803), was amended so as to read :—

SECTION 1. *Be it enacted, etc.*, That it shall not be lawful for any person or persons, railroad company or other corporation, or any association of persons, to bring into this State, any Texas or Cherokee cattle, except between the first day of October and the first day of March following, of each year : *Provided*, that the right to bring into this State any such cattle, shall in no case be any defense for any injury sustained to any one, by reason of the bringing of such cattle into this State.

SECTION 2. That it shall not be lawful for any person or persons, within this State, to own, or have in possession or control, any Texas or Cherokee cattle, at any time, which may have been brought into this State at any time except between the first day of October and the first day of March following, of each year.

Act of April 16, 1869, Laws page 402; the other sections merely enforcing the above.

Following the Husen case, this amendatory act was declared unconstitutional in *Salzenstein et al. v. Mavis* (1879), 91 Ill. 391; *Chicago & A. RR. Co. v. Erickson*, Id. 613, and

Jarvis et al. v. Riffin (1879), 94 Id. 164. In the first of these cases, the effort to sustain the Second Section of this Act was thus denied:—

If the legislature has the constitutional right to declare that a person shall not possess, or own, a certain kind of property within the State, which may be raised or produced in another State of the Union, it logically follows that all interstate commerce in such property is both regulated by the legislature and also prohibited. We do not understand that the legislature can do, indirectly, that which the Constitution of the United States prohibits to be done directly: CRAIG, C. J., *Salzenstein et al. v. Mavis* (1879), 91 Ill. 391, 401.

The State of Iowa adopted (April 8, 1868; 12 G. A. 272) a statute almost as stringent as the Illinois act of 1867 (*supra*, page 803); but in the Code of 1880, these provisions were so modified as to secure the approval of the Supreme Court of the United States (*Kimmish v. Ball*, 1889, 129 U. S. 217), on a unanimous opinion by Justice FIELD. The sections of the Code thus declared valid police regulations, were—

SEC. 4058. If any person bring into this State, any Texas cattle, he shall be fined not exceeding one thousand dollars, or imprisoned in the county jail not exceeding thirty days, unless they have been wintered at least one winter, north of the Southern boundary of the State of Missouri or Kansas: *Provided*, That nothing herein contained shall be construed to prevent or make unlawful the transportation of such cattle through this State on railways, or to prohibit the driving through any part of this State, or having in possession, any Texas cattle, between the first day of November and the first day of April following.

SEC. 4059. If any person, now or hereafter, has in his *possession*, in this State, any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large and thereby spreading the disease known as the Texas fever, and shall be punished as is prescribed in the preceding section.

The case cited began in the United States Circuit Court for the Southern District of Iowa, by P. C. Kimmish suing for damages suffered by loss of cattle, infected in June, 1885, by the Texas herd of the defendants, which had not been wintered as required by Section 4058. On a demurrer in March Term 1888, the Justices were opposed in their opinion of the Constitutionality of Section 4059, and the case was then certified to the Supreme Court of the United States

upon this difference of opinion. Between the time Kimmish lost his cattle by infection, and the trial of the demurrer, these sections were repealed and the following were substituted :—

SECTION 4058. Any person or persons driving any cattle into this State, or any agent, servant, or employe of any railroad, or other corporation, who shall carry, transport, or ship any cattle into this State, or any railroad company, or other corporation, or person, who shall carry, ship or deliver any cattle into this State, or the owners, controllers, lessees, or agents, or employes of any stock yards, receiving into such stock yards, or in any other enclosures for the detention of cattle in transit, or shipment, or reshipment or sale, any cattle brought or shipped in any manner into this State, which at the time they were either driven, brought, shipped or transported into this State, were in such condition as to infect with, or to communicate to other cattle, pleuro-pneumonia, or splenic or Texas fever, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than three hundred dollars, and not more than one thousand dollars, or by fine and imprisonment in the county jail not exceeding six months, in the discretion of the Court.

SEC. 4059. Any person who shall be injured, or damaged by any of the acts of persons named in Section 4058, and which are prohibited by such section, in addition to the remedy therein provided, may bring an action at law against any such persons, agents, employes, or corporations mentioned therein, and recover the actual damages sustained by the person or persons so injured, and neither said criminal proceeding, nor said civil action, in any stage of the same, [shall] be a bar to a conviction or to a recovery in the other : Act of April 10, 1886 ; 21 G. A. 182-3.

Justice FIELD pointed out that the Texas cattle, against which the law was directed, were those which had not been wintered North of a fixed line. South of this line the cattle were supposed to become infected with the germs of a distemper which would be communicated to other cattle, feeding in the same pasture, unless these germs were destroyed by the cold usual to the North of the fixed line. Against such sanitary precautions, there could be no Constitutional objections; the action being for damages, brought before the Court section 4059 and not section 4058, and there could not be the slightest doubt that a person, permitting diseased cattle to run at large, could be made to answer for the consequences. Such liability could not be escaped by reason either of the origin of the cattle (under the com-

merce clause, *supra*, page 420), or of the defendant's domicile in another State (under the equal rights clause of the Constitution, *supra*, page 515).

Similar decisions under the same law had been made in *Swift v. Sulphin*, Sept. 13, 1889, U. S. Circ. Ct., N. Dist. Ill., 39 Fed. Repr. 630; *In re Christian*, 1889, by the Judges of the Eleventh Judicial Dist. of Minn., Id. 636, note.

In Indiana, a similar conclusion had been reached in the State Circuit Court for Porter County (*Harvey v. Huffman*, 1889, 39 Fed. Repr. 646, note), upon—

AN ACT for the protection of the public health by promoting the growth and sale of healthy cattle and sheep, making it a misdemeanor to sell the same without inspection before slaughtering within this State, and to authorize cities to appoint inspectors. (Approved, March 2, 1889, Laws, page 150.)

SECTION 1. It shall be illegal to sell, or offer, or expose for sale, in any incorporated city within this State, beef, mutton, lamb or pork, for human food, except as hereinafter provided, which has not been inspected alive within the county, by an inspector, or his deputy, duly appointed by the authorities of said county in which said beef, mutton, lamb or pork, is intended for consumption, and found by such inspector to be pure, healthy, and merchantable; and for every such offense, the accused, after conviction, shall be fined not more than two hundred dollars, nor less than ten.

SEC. 2. That the City Council is hereby empowered and required to appoint, in each incorporated city within the county, one or more inspectors and deputies, furnish the necessary blanks, and decree the fees for such inspection: *Provided*, That where farmers slaughter cattle, sheep or swine of their own raising or feeding, for human food, no other inspection shall be required, or penalty enforced, than such as are already provided by law to prevent the sale and consumption of diseased meats.

SEC. 3. Nothing herein contained shall prevent or obstruct the sale of cured beef or pork known as dried, corned, or canned beef, or smoked or salted pork, or other cured or salted meats.

That is, the Act prevented the introduction of all dressed fresh meats, articles of commerce extensively carried from State to State. No discrimination was made between sound or diseased meat, and no provision for inspection. Of course, such a law could not be valid.

One of the latest of these cattle cases began with the conviction of Henry E. Barber before a Justice of the Peace

in Ramsey County, Minnesota, for a violation of the fourth section of—

AN ACT for the Protection of the Public Health by Providing for Inspection before Slaughter of Cattle, Sheep and Swine Designed for Slaughter for Human Food. (Approved, April 16, 1889; Laws, p. 51.)

SECTION 1. The sale of any fresh beef, veal, mutton, lamb, or pork, for human food, in this State, except as hereinafter provided, is hereby prohibited.

SEC. 2. It shall be the duty of the several local boards of health of the several cities, villages, boroughs and townships within this State, to appoint one or more inspectors of cattle, sheep and swine, for said city, village, borough or township, who shall hold their offices for one year, and until their successors are appointed and qualified, and whose authority and jurisdiction shall be territorially co-extensive with the board so appointing them; and said several boards shall regulate the form of certificate to be issued by such inspectors, and the fees to be paid them by the person applying for such inspection, which fees shall be no greater than are actually necessary to defray the costs of the inspection provided for in Section Three of this Act.

SEC. 3. It shall be the duty of the inspector appointed hereunder, to inspect all cattle, sheep and swine, slaughtered for human food within their respective jurisdictions, within twenty-four hours before the slaughter of the same, and, if found healthy, and in suitable condition to be slaughtered for human food, to give to the applicant a certificate in writing to that effect. If found unfit for food, by reason of infectious disease, such inspectors shall order the immediate removal and destruction of such diseased animals, and no liability for damages shall accrue by reason of such action.

SEC. 4. Any person who shall sell, expose, or offer for sale for human food, in this State, any fresh beef, veal, mutton, lamb or pork, whatsoever, which has not been taken from an animal inspected and certified before slaughter by the proper local inspector, appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than one hundred dollars, or by imprisonment not exceeding three months, for each offense.

SEC. 5. Each and every certificate made by inspectors under the provisions of this Act, shall contain a statement to the effect that the animal or animals inspected, describing them as to kind and sex, were, at the date of such inspection, free from all indication of disease, apparently in good health, and in fit condition, when inspected, to be slaughtered for human food; a duplicate of which certificate shall be preserved in the office of the inspector.

Barber then petitioned the United States Circuit Court for the District of Minnesota for a *habeas corpus*, alleging the State law to be in conflict with the commerce and equal

rights clauses of the Constitution: this was the opinion of the District Judge, Hon. RENNELAER R. NELSON: *In re Barber*, September 23, 1889 (39 Fed. Repr. 641), who released Barber. The State then appealed to the Supreme Court of the United States, where the law was again declared unconstitutional, May 19, 1890 (136 U. S. 313), on a unanimous opinion by Justice HARLAN from which some extracts may be added:—

Underlying the entire argument, on behalf of the State, is the proposition that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered: that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. And it is insisted, with great confidence, that of this fact, the Court must take judicial notice. * * * * (136 U. S. 320-1.)

But if, as alleged, the inspection of fresh beef, veal, mutton, lamb or pork, will not necessarily show whether the animal from which it was taken, was diseased when slaughtered, it would not follow that a statute like the one before us is within the Constitutional power of the State to enact. On the contrary, the enactment of a similar statute by each one of the States composing the Union, would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. A careful examination of the Minnesota Act will place this construction of it beyond question. * * * * (Id. 321.)

As the inspection must take place within the twenty-four hours immediately before the slaughtering, the Act, by its necessary operation, excludes from the Minnesota market, practically all fresh beef, veal, mutton, lamb or pork—in whatever form, and although sound, healthy, and fit for human food—taken from animals slaughtered in other States; and directly tends to restrict the slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that State. * * * *

When to this is added the fact that the statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb or pork, from animals that may have been inspected carefully and thoroughly in the State where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. It will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals slaughtered for purposes of human food. (Id. 322.)

For authority, the opinion cited *Woodruff v. Parham*,

Hinson v. Lott, Welton v. Missouri, Hannibal & St. J. RR. Co. v. Husen, Guy v. Baltimore and Walling v. Michigan (*supra*, pages 728, 735, 751, 801, 817, 738), to show that no State could discriminate against the products of other States in this manner; not even if the burden fell equally upon citizens and travelers, for that kind of equality contravened the principles of *Robbins v. Taxing District, supra*, page 758, and the *State Freight Tax Case* (1873), 15 Wall. (82 U. S.) 232; and consequently no analogy was permitted to be drawn from *Patterson v. Kentucky, supra*, page 742.

XXI.

Auction sales of original packages of foreign origin, cannot be taxed directly or by license exacted from the auctioneer. Otherwise of goods produced in one of the States of the Union.

A State may lay a general tax upon a kind of business, the subjects of which may enter into interstate and foreign commerce, so long as that commerce is not made a matter of privilege.

Cook v. The Commonwealth of Pennsylvania (1878), 7 Otto (97 U. S.) 566, was another instance where a State undertook to lay a tax on the privilege of selling foreign goods at auction, notwithstanding the principles of *Brown v. Maryland* (*supra*, page 439). The State authorities of Pennsylvania, January 31, 1871, settled an account against Samuel C. Cook, an auctioneer of the City of Philadelphia, for non-payment of State taxes claimed to be due upon auction sales of foreign goods in the original packages, under—

SEC. 18. That hereafter the State duty, to be paid on sales by auction in the counties of Philadelphia and Allegheny, shall be on all domestic articles and groceries, one-half of one per cent. ; on foreign drugs, glass, earthen-ware, hides, marble, wool, and dye-woods, three-quarters of one per cent: Act of May 20, 1853, P. L. 679.

SEC. 6. That said auctioneers shall pay into the treasury of the Commonwealth, a tax or duty of one-fourth of one per centum on all sales of loans or stocks, and shall also pay into the treasury aforesaid, a tax or

duty, as required by existing laws, on all other sales to be made as aforesaid, except on groceries, goods, wares and merchandise of American growth or manufacture, real-estate, shipping or live stock ; and it shall be the duty of the auctioneer having charge of such sales, to collect and pay over to the State treasurer, the said duty or tax, and give a true and correct account of the same, quarterly, under oath or affirmation, in the form now required by law: Act of April 9, 1859, P. L. 436.

A few days after the decision in Cook's case, this exception in favor of American goods was removed by the Act of May 19, 1871 (P. L. 270), but the question was decided on the broader ground of taxation of original packages of foreign origin.

Following the practice in that State, Cook appealed to the Dauphin County Court, where judgment was rendered against him, on an opinion by PEARSON, P. J., May 16, 1871, in which *Brown v. Maryland* was recognized, but held inapplicable because the tax was not laid on the importer, but upon the auctioneer, as was done in *Nathans v. Louisiana* (1850), 8 How. (49 U. S.) 73, in the case of a dealer in foreign bills of exchange. But the comparison was inaccurate, because in the latter case, the unanimous opinion of the Court upheld the validity of the tax, as was afterwards done in *Brown v. Houston* (*supra*, page 732), because—

No one can claim exemption from a general tax on his business, within the State, on the ground that the products sold, may be used in commerce. No State can tax an export, or an import, as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton-broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation: McLEAN, J., *Nathans v. La.* (1850), 8 How. (49 U. S.) 73, 80-1.

The Pennsylvania Judge also based his opinion upon this remark by Chief Justice MARSHALL, in answer to the argument, so often advanced in subsequent cases but never with effect upon the Court (*supra*, pages 462, 491), that the Constitutional power ceased from the instant the goods entered the State:—

Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service,

as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, [as was this case] without annexing to it, also the privilege of using the officers licensed by the State to make sales in a peculiar way [as was not claimed or the case, *supra*, page 439]: MARSHALL, C. J., *Brown v. Maryland* (1827), 12 Wheat. (25 U. S.) 419, 443.

The case was heard in the Pennsylvania Court, upon a case stated, which was not clear upon the necessity for the use of an auctioneer by the importer, and consequently the County Judge considered himself justified in taking for granted that the employment of the auctioneer was a mere convenience, although the Act of 1859 provided:—

SECTION 8. It shall not be lawful for any person, or persons, to make sales by auction, or by public outcry, in the City of Philadelphia, or County of Allegheny, of real estate, stocks, loans, vessels, merchandise and personal property of any description, except it be by a duly commissioned auctioneer of the said City or County: *Provided*, That this Act shall not be so construed as to interfere with any sales authorized by the Courts of said City or County, or in consequence of any legal proceeding whatever, or of personal property sold in consequence of the owner declining business or housekeeping: Act of April 9, 1859, P. L. 436.

This judgment was affirmed in the State Supreme Court, May 23, 1873, without any opinion being filed, but reversed by the Supreme Court of the United States upon a unanimous opinion by Justice MILLER, because the tax was on the privilege of selling the foreign goods.

It is said that the importer could himself have made sale of his goods, without subjecting the sale to the tax. The argument is fallacious, because without an auctioneer's license he could not have sold at auction, even his own goods. If he had procured, or could have procured a license, he would then have been subject, by the statute, to the tax, for it makes no exception. By the express language of the statute, the auctioneer is to collect this tax, and pay it into the treasury. From whom is he to collect it, if not from the owner of the goods? If the tax was intended to be levied on the auctioneer he would not have been required first to collect it and then pay it over: MILLER, J., *Cook v. Pa.* (1878), 7 Otto (97 U. S.) 566, 570-1.

That the tax for the privilege of selling, did fall upon the goods where the State could not directly place it, was then declared upon the principles expounded in the *Passenger Cases*, *Crandall v. Nevada*, *Henderson v. The Mayor and Welton v. Missouri* (*supra*, pages 460, 463, 465, 751), with-

out going back to their origin in *Brown v. Maryland* (*supra*, page 439). Upon this point, *Cook v. Pa.* has been recognized by Justice SWAYNE, in *Mach. Co. v. Gage*, *supra*, page 753 ; Chief Justice WAITE, in *Western U. Tel. Co. v. Texas* (1882), 15 Otto (105 U. S.) 460, 465 ; Justice MILLER himself, in *Fargo v. Michigan* (1887), 121 U. S. 230, 244 ; Chief Justice FULLER as well as the dissenting Justices in the *Original Package Case*, *supra*, pages 508, 535.

XXII.

Inspection laws are not derived from any power to regulate commerce, but from right of every State to improve the quality of domestic articles before they enter into commerce, domestic, interstate or foreign.

Inspection laws are a part of State legislation embracing everything within the territory of the State which has not been placed in the care and control of the government of the United States.

Legitimate inspection laws relate to the quality of the articles, or their form, or capacity, or the dimensions and weight of their packages, as ascertained by a public officer at any reasonable place fixed by law.

Inequitable but legitimate inspection laws can only be remedied by Congress and not by the Courts, when the States persist in enforcing them.

Laws requiring tobacco casks to be weighed and measured at a particular place, before transportation out of the State, are legitimate inspection Laws, though no such provisions are enacted as to tobacco transported from place to place within the State.

Turner v. Maryland (1883), 17 Otto (107 U. S.) 38, was a case of inspection prescribed for goods destined to points without the State, just as *Crandall v. Nevada*, (*supra*, page 463) was a tax on passengers departing from the State. The difference between a legitimate inspection fee and a tax on

outward commerce caused the former to be sustained while the latter was declared void.

The case began by the presentment of Henry A. Turner, September 18, 1880, in the Criminal Court of the City of Baltimore, for shipping to Bremen, in Germany, a hogshead of tobacco raised by him in Charles County, in that State, without having been inspected to ascertain whether the hogshead was of the dimensions and weight required by the State Act of March 10, 1864, chapter 346, (Laws of 1864, page 482) as modified by the subsequent Act of April 4, 1870, chapter 291, (Laws of 1870, page 502).

Turner demurred, and his demurrer being overruled, September 20, 1880, he was fined. On appeal, this judgment was affirmed, January 21, 1881, on the ground that the Colony, and subsequently the State, had always enforced compulsory inspection of tobacco, which was not a tax on exports, within the Constitutional provision (*supra*, page 425).

The object of inspection laws, ordinarily, is to improve the quality of the productions of a country, and thereby better fit them for domestic use or exportation. But we are by no means prepared to concede that the inspection must be confined to an examination of the quality of the article itself. To prepare the products of a State for exportation, it may be necessary that such products should be put in packages of a certain form, and of certain prescribed dimensions. This may be necessary, either on account of the nature and character of such products, or to enable the State to identify the products of its own growth and to furnish the evidence of such identification in the markets to which they are exported: ROBINSON, J., *Turner v. The State* (1881), 55 Md. 240, 263-4.

The judgment was then removed to the Supreme Court of the United States, and there finally affirmed, February 5, 1883, on a unanimous opinion by Justice BLATCHFORD, who thought the views of the Maryland Court to be sound, and added, that—

Fixing the identity and weight of tobacco alleged to have been grown in the State, and thus preserving the reputation of the article in markets outside of the State, is a legitimate part of inspection laws, and the means prescribed therefor in the statutes in question, naturally conduce to that end. Such provisions, as parts of inspection laws, are as proper as provisions for inspecting quality, and it cannot be said that the absence of the latter provisions, in respect to any particular class of tobacco, necessarily causes the laws containing the former provisions to cease to be in-

spection laws. It is easy to see that the use of the precaution of weighing and marking the weight on the hogshhead, and recording it in a book, is to enable it to be determined at any time, whether the contents have been diminished subsequently to the original packing; by comparing a new weight with the original marked weight, or if the marked weight be altered, with the weight entered in the warehouse book. The things required to be done in respect to the hogshhead of tobacco in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshhead as a unit containing the tobacco, for exportation, and for becoming an article of foreign commerce or commerce among the States, and are to be done before it becomes such an article. They are properly parts of inspection laws, within the definition given by this Court in *Gibbons v. Ogden* (1824), 9 Wheat. (22 U. S.) 1, 203: (17 Otto, 107 U. S. 49-50.)

The reference is to this language of Chief Justice MARSHALL, in the famous New York case, after he had pointed out that duties on imports or exports were parts of the taxing power, which undoubtedly remained with the States, whereas the regulation of foreign and interstate commerce (even by the coasting license here held to override the New York Steamboat monopoly) by Congress could not be concurrent with that by the States, individually: he then proceeded—

But the inspection laws are said to be regulations of commerce and are certainly recognized in the Constitution, as being passed in the exercise of a power remaining with the States. That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The objects of inspection laws is to improve the quality of articles produced by the labor of the country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of the mass: MARSHALL, C. J., *Gibbons v. Ogden* (1824), 9 Wheat. (22 U. S.) 1, 203.

The identity of inspection laws with those enacted under the taxing power of the State, was declared anew in this Maryland case, in express recognition of the first statement

of this classification, fifty-five years earlier, made in these words:—

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause, had the exemption not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws [*supra*, page 425], goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited: MARSHALL, J., *Brown v. Md.* (1827), 12 Wheat. (25 U. S.) 419, 438.

Contemporaneously with *Turner v. Maryland*, Justice MILLER wrote the opinion in *People v. Compagnie Generale Transatlantique* (1882), 17 Otto (107 U. S.) 59, where the New York laws, taxing immigrants, were declared void (*supra*, page 465), because not legitimate inspection laws. In place of the definition given by Justice BLATCHFORD, in *Turner v. Maryland* (on page 55) and substantially stated *supra*, page 813, there were these imperfect tests given by the other Justice:—

What laws may be properly classed as inspection laws under this provision of the Constitution [*supra*, page 425], must be largely determined by the nature of the inspection laws of the States, at the time the Constitution was framed. * * * What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it, at once, some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever: MILLER, J., *People v. Compagnie Generale Trans.* (1883), 17 Otto (107 U. S.) 59, 61, 62.

Other attempts to define inspection laws have distinguished their object as "to certify the quantity and value of the articles inspected, whether imports or exports, for the protection of buyers and consumers": SWAYNE, J., in *Foster v. Master and Wardens of New Orleans* (1877), 4 Otto (94 U. S.) 246, 247; but the latest substantially restates that declared in *Turner v. Maryland*; FULLER, C. J., *supra*, page 502, quoting from the opinion of MATTHEWS, J., in *Bowman v. Chicago & N. W. RR. Co.* (1888), 125 U. S. 465, 488, and *infra*.

After the Maryland law was thus declared to be a valid inspection law, Justice BLATCHFORD, for the Court, proceeded to point out that the second objection to the law, was equally futile; that is, granting that there was no inspection and no fee for tobacco to be manufactured in the State and then transported out of its limits, still such preference of home manufacturers was within the power of the State, if exercised before the tobacco became an article of commerce. This is evidently upon much the same principle as State taxation of articles grown or prepared for sale out of the State but not yet started; as was the case with the New Hampshire timber in *Coe v. Errol*, *infra*, page 821.

XXIII.

A State law, authorizing a municipality to collect wharfage from vessels laden with the products of other States and countries, while such dues are not demanded from vessels laden with the same articles when produced in the State, is a regulation of interstate commerce and is void.

The denial to the States, of the power to lay any duty of tonnage without the consent of Congress, was intended to protect the freedom of commerce and therefore does not invalidate legitimate wharf dues measured by the capacity of the vessels using the wharves.

Local taxation of vessels by their capacity instead of by value, is unconstitutional.

Guy v. Mayor & City Council of Baltimore (1880), 10 Otto (100 U. S.) 434, was another case of an unsuccessful discrimination attempted by the laws of Maryland. Captain Guy of the schooner *George S. Powell*, was sued before a justice of the peace by the City of Baltimore, June 29, 1876, for not paying wharfage required by the City ordinance for a cargo of potatoes raised in Virginia. This ordinance required wharfage for "articles sold by the bushel, other than the product of the State of Maryland," under the authority of—

An Act to appoint State Wharfingers in the City of Baltimore, and to authorize the collection of wharfage in certain cases, in said City. (Passed March, 11, 1828, Laws, chap. 162.)

SEC. 4. *And be it enacted, That the Mayor and City Council of Baltimore shall be, and they are hereby empowered and authorized to [may] regulate, establish, charge and collect, to the use of the [city] said Mayor and City Council, such rate of wharfage as they may think reasonable, of and from all vessels resorting to or lying at, landing, depositing, or transporting goods, or articles other than the productions of this State, on any wharf or wharves, belonging to the [city] said Mayor and City Council, or any public wharf in the said City, other than the wharves belonging to or rented by the State : and that part of Pratt Street Wharf heretofore reserved for the use of citizens of this [the] State, anything in any former act of Assembly to the contrary notwithstanding.*

This Section appeared in the Code of Public Local Laws as section 945 of Article IV, and was changed by Act of April 10, 1880, chap. 218, Laws, page 356, Public Local Laws, ed. 1888, Art. IV, § 368, by omitting the words in italics and inserting those in brackets, as above: the unconstitutional discrimination was thus repealed.

The judgment entered against Guy by the justice of the peace, was affirmed on appeal by the Baltimore City Court, October 14, 1876, this Court denying that the commerce, impost or equal rights clauses of the Constitution had been violated. This was contrary to the decision of Chancellor BLAND in *The Wharf Case* (1831), 3 Bland's Chan. (Md.) 361, 371, 374, where rival owners claimed the wharf dues from certain wharves and the decree was that none should be taken. The judgment was then removed to the Supreme Court of the United States, and there reversed March 22, 1880, upon an opinion by Justice HARLAN, Chief Justice WAITE dissenting on the peculiar ground that the State had merely prohibited the City from collecting wharfage from the products of the State. In principle, this is much the same objection of preference by the United States Courts for strangers over inhabitants of the State, as was raised in *Robbins v. Taxing District* (ante, page 762) and there denied upon the apparent ground that the State made the preference by its unconstitutional legislation.

The opinion of the Supreme Court proceeded on that

principle of *Brown v. Maryland* (*supra*, page 440), which denied to the States, power to discriminate against the products of other States, by taxing them with discrimination in favor of local products: the citations were of the later cases relating to American products (*supra*, pages 728, 735, 748, 751), but it is now clear that the distinction to be drawn in such cases as *Brown v. Maryland* and *Brown v. Houston* (*supra*, pages 439, 732) is in the extent of the taxation, which cannot be imposed upon imports at all, and upon the products of other States only without discrimination.

The wharfage charged to Captain Guy was therefore regarded by the Supreme Court as a tax and not merely reasonable compensation for the use of the wharf. For it is to be observed that the reasonableness of this fee, taken by itself, was not denied. On the contrary, the opinion expressly recognized the principles of three recent cases on the subject of wharfage.

The first of these was *Keokuk N. L. Packet Co. v. City of Keokuk* (1877) 5 Otto (95 U. S.) 80, where the Supreme Court recognized the right of a municipality to collect wharfage proportioned to the tonnage of the boats using the particular landing. The rates were no more than sufficient to pay the interest on the money borrowed to improve the wharves, and the fact that they were measured by the capacity of the boats did not make this a tonnage tax within the prohibition of the Constitution. That prohibition is directed against port dues or charge for use of the harbor and all landing places, as declared in *Cannon v. New Orleans* (1874), 20 Wall. (87 U. S.) 577; *The Northwestern Union Packet Co. v. St. Paul* (1874), U. S. Circ. Ct. Dist. Minn., 3 Dill. 454; *The Southern Steamship Co. v. Port Wardens* (1867), 6 Wall. (73 U. S.) 31; *Peete v. Morgan* (1874), 19 Wall. (86 U. S.) 581; *State Tonnage Tax Cases* (1871), 12 Wall. (79 U. S.) 204; *Cincinnati P. B. G. & P. Packet Co. v. Catlettsburg* (1882), 15 Otto (105 U. S.) 559; *Parkersburg & O. River Transp. Co. v. Parkersburg* (1883), 17 Otto (107 U. S.) 691; *Huse v. Glover*

(1886), 119 U. S. 543 ; *Ouachita & M. River Packet Co. v. Aiken* (1887), 121 Id. 444 ; *Inman Steamship Co. v. Tinker* (1876), 4 Otto (94 U. S.) 238 ; and not against reasonable charges for use of property : FIELD, J., *Gloucester Ferry Co. v. Pa.* (1885), 114 U. S. 196, 217 ; though, locally, vessels are also protected against taxation by the ton instead of by value : *State Tonnage Cases*, *Peete v. Morgan*, *Cannon v. New Orleans*, and *Steamship Co. v. Tinker*, *supra* ; that is, as the subject cannot be further developed here,—

What was intended by the provisions of the second clause of the tenth section of the first article [of the Constitution, *supra*, page 425], was to protect the freedom of commerce, and nothing more. The prohibition of a duty of tonnage should, therefore, be construed so as to carry out that intent : STRONG, J., *Keokuk N. L. Packet Co. v. Keokuk* (1877), 5 Otto (95 U. S.) 80, 87.

The second of these wharfage cases was the *Northwestern Union Packet Co. v. City of St. Louis* (1880) 10 Otto (100 U. S.) 423, where the City was allowed to collect a tonnage charge upon every vessel landing at any wharf in that City, the charge being admittedly reasonable in amount for the use of the improved wharf facilities and not for the raising of general revenue. This decision was immediately affirmed in the third of these cases that of *Vicksburg v. Tobin* (1880), Id. 430. These two cases, were decided three weeks before *Guy v. Baltimore*, so that the whole subject of wharfage was before the Court in its two aspects of tonnage taxation and preference for local vessels or products.

So far as any attempt might be made to obtain general revenue from wharfage, the unconstitutionality of such laws was again declared by Justice MILLER, in *Morgan's La. & T. RR. & Steamship Co. v. Louisiana* (1886), 118 U. S. 455, 462 ; and by Justice BRADLEY, in *Ouachita & M. River Packet Co. v. Aiken* (1887), 121 Id. 444. In this respect, there was nothing else than a reaffirmance of the principles of the *Passenger Cases*, *supra*, page 460.

The unconstitutionality of the preference shown by the Maryland law in the wharfage dues, has been distinctly recognized by Justice SWAYNE, in *Machine Co. v. Gage*, *supra*,

page 753; Justice BRADLEY, in *Walling v. Michigan*, *supra*, page 738, and *Phila. & S. M. S. Co. v. Pa.* (1887), 122 U. S. 326, 345; Justice BLATCHFORD in *Pickard v. Pullman S. Car Co.* (1886), 117 Id. 34, 49.

XXIV.

Logs temporarily stopped by low water, in their course through a State from one State to a third, cannot be taxed where they are stopped.

Property can be taxed where it is situated, though the owner is a resident of another State.

The products of a State may be taxed, though intended for removal to another State or country, until they are delivered to a common carrier or their ultimate passage from the State has begun.

The case of *Coe v. The Town of Errol* (1886), 116 U. S. 517, began in the Supreme Court of New Hampshire, June 25, 1881, by the plaintiff's petition for relief from taxation upon logs destined for manufacture and sale in the State of Maine, but then lying in the said Town of Errol. Some of these logs had been cut in New Hampshire and some in Maine, though being detained by low water in the Androscoggin; but all of them were alleged to be in transit to market from one State to another. The taxation on the logs cut in Maine was directed to be abated (*Coe v. Errol*, 1882, 62 N. H. 303, 313), but that on the logs cut in New Hampshire was declared valid, BLODGETT, J., saying—

The assessments were made under s. 13, c. 54, Gen. Laws, which provides that wood, bark, timber, logs, and lumber, manufactured or other, exceeding fifty dollars in value, shall be taxed at its full value, in the town where it is on the first day of April. * * * But it is urged that inasmuch as the logs were in transit and seeking a market in another State, the tax imposed was one upon commerce, and therefore in conflict with the federal Constitution. This contention is groundless. At most, the statute under which the assessment was made, simply acts upon and affects property which may be the subject of commerce. But a tax on property that may be the subject of commerce under Congressional regulation, is not a tax on commerce, but on property: *Scott v. Willson* (1825), 3 N. H. 321, 326; *Cooley*, Tax. 62; neither is a tax on property that has

been the subject of such commerce, where it is taxed only as property, and in common with all other property within the State: *Brown v. Maryland* (1827), 12 Wheat. (25 U. S.) 419; *Pervear v. Comm.* (1865), 5 Wall. (72 U. S.) 475, 479; *Waring v. The Mayor* (1868), 8 Wall. (75 U. S.) 110. The conclusion then is, that the logs in question, having at the time of their taxation, an actual and legal *situs* in this State, and having been taxed only as property and in common with all other property, under a law making no discrimination in respect of ownership, no case is made for relief: (62 N. H. 312, 313).

The case having been removed to the Supreme Court of the United States, the judgment was there affirmed on a unanimous opinion by Justice BRADLEY, who denied the two propositions of the log owner, respecting the logs cut in New Hampshire, but not yet removed from the State. The *first* was, that his property could not be taxed because he was a resident of another State, and by legal fiction, his property had its *situs* in Maine. But the Court thought the power of State taxation was too plain for citation of authorities.

The *second* proposition was, that the products of a State, though intended for removal to another State and partially prepared by removal to a place of shipment, were not liable to State taxation. But the Court thought this untenable because making taxation dependent upon the owner's state of mind and incomplete action. That is—

When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in the process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State. * * * Although intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? BRADLEY, J., *Coe v. Errol* (1886), 116 U. S. 525-6.

This was not a new sentiment in the Supreme Court of

the United States. Thirty-four years earlier, when limiting the operation of a United States coasting license to navigable waters, and thereby giving a State full control over streams entirely within its borders, and not naturally navigable, and not part of a line of interstate commerce (*supra*, pages 482-3 and 800), the Court, speaking by Justice DANIEL, repudiated an extension of the commerce power over the products of domestic enterprise, in agriculture, or manufactures, or in the arts, because ultimately liable or intended to enter into foreign or domestic commerce.

A pretension as far-reaching as this, would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals or railroads, from point to point within the several States, towards an ultimate destination, like the one mentioned: DANIEL, J., *Veazie v. Moor* (1852), 14 How. (55 U. S.) 574.

It will be remembered from the review of *Brown v. Houston* (*supra*, page 732), that there is a distinction also between the termination of interstate and foreign carriage, in respect to the period when a State may begin to lay ordinary (as distinguished from discriminative) taxation: that is, an import cannot be taxed until broken up or otherwise mingled with and lost in the common mass of property (*supra*, pages 439, 443); but goods are imports only when brought in from foreign nations, and not from other States of the Union (*supra*, pages 719-20); and therefore the ordinary powers of State taxation are not defeated by retaining domestic goods in their original packages. But in respect to restraints upon interstate commerce, though not so expressed and laid equally on all property in the State in otherwise the most unobjectionable form of taxation, license, or other police regulation, all such restraints are simply void as to merchandise in the original packages, though valid as to other property in the State (*infra*, page 824).

The case of *Clarke v. Clarke*, in the United States Circuit

Court for the Southern District of Georgia, 3 Woods 408, has already been alluded to (*supra*, page 444); further attention may here be given to its facts, for the logs upon which the tax was levied, were the property of persons exclusively engaged in exporting timber to foreign countries, and had been purchased for the purpose of export, their shipment being deferred for want of vessels. The Circuit Judge (WOODS) was urged to declare the logs not yet separated from the mass of property taxable; he declined upon the solitary ground of their being exports, and not that they were to be carried out of the State generally and perchance to another State. The decision would not, therefore, be contrary to the rule declared in *Coe v. Errol*, until the business of an exporter is denied to be an agency of foreign commerce. The decisive test used by Justice BRADLEY (*supra*, page 822), of ability to change intention and not remove the property from the State after it has escaped from taxation, would not apply to a mere exporter, but only to one who carried on a dual business of exporting and American trade. This dual business caused the taxation of the coal actually exported in *Brown v. Houston* (*supra*, page 732).

The substance of the whole subject is, that the State's power of taxation continues until it actually collides with the Constitutional freedom of foreign and interstate commerce.

XXV.

A State cannot prevent a common carrier from receiving merchandise in another State and carrying it into its territory, and there delivering it to the consignee.

Intoxicating liquors are merchandise which a common carrier cannot refuse to receive, because the State into which intoxicating liquors are consigned, forbids their carriage into its territory.

Bowman et al. v. Chicago & N. W. RR. Co. (1888), 125 U. S. 465, came into the Supreme Court of the United States from the United States Circuit Court for the Northern District of Illinois, to revise the entry of judgment (October 6,

1886), for the railroad company upon their demurrer to an action brought (June 15, 1886), by Bowman Brothers, for a refusal to transport five thousand barrels of beer from Chicago to Marshalltown in the State of Iowa. Admitting the duty of a railroad as a common carrier, the defense was put upon the ground that the State of Iowa had prevented the railroad company from receiving and transporting into Iowa the beer in question by—

CHAPTER 66. AN ACT Amendatory of Chapter 143 of the Acts of the Twentieth General Assembly Relating to Intoxicating Liquors and Providing for the More Effectual Suppression of the Illegal Sale and Transportation of Intoxicating Liquors and Abatement of Nuisances. (Passed April 5, 1886: Laws, page 81.)

SECTION TEN. That section 1553 of the Code, as amended and substituted by Chapter 143 of the Acts of the Twentieth General Assembly, be, and the same is hereby repealed, and the following enacted in lieu thereof:

SECTION 1553. If any express company, railway company, or any agent or person in the employ of any express company or railway company, or if any common carrier or any person in the employ of any common carrier, or any person, knowingly bring within this State, for any person or persons or corporation, or shall knowingly transport or convey between points or from one place to another within this State, for any other person or persons or corporations, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the County Auditor of the County to which said liquor is to be transported, or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed or delivered, is authorized to sell such intoxicating liquors in such County, such company, corporation or person so offending, and each of them, and any agent of such company, corporation or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offense, and pay costs of prosecution; and the costs shall * * * include a reasonable attorney fee, to be assessed by the court, which shall be paid into the County * * * fund, and shall stand committed to the County jail until such fine and costs of prosecution are paid. The offense herein defined, shall be held to be complete, and shall be held to have been committed in any County of the State through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation, or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several County Auditors of this State to issue the Certificate herein contemplated, to any person having such permit; and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires, as shown by the County Records.

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In the Supreme Court of the United States, the Attorney General of Iowa also took part in the argument to sustain the validity of the State law: and his most important position was that the act was simply intended to prevent the sale and use of intoxicating liquors within the State, as property prejudicial to health, morality and good order. Justice MATTHEWS, writing the opinion of the majority of the Court, conceded that this was the object of the law, as one of a system of legislation upon the sale and use of intoxicating liquors, among which beer had been placed by statute (page 475), but still denied the validity of such a law, because it was a restraint upon transportation of freight, and thus in effect a regulation of commerce (page 486.)

Upon the question of State regulation of the manufacture and sale of liquor, there was no retreat from the position taken by the Court in *Mugler v. Kansas* (1887), 123 U. S. 623, where State prohibition of the manufacture of liquor was declared to be valid, even though property should be rendered useless, or abated as a nuisance and no compensation be made. This *Mugler Case* remains the law of the Court: the *Original Package Case*, *supra*, pages 509, 511, 517, 518; though the right of every citizen to pursue an ordinary calling and in it to buy and sell property, is recognized as far as it does not conflict with the legitimate exercise of State police power, in *Powell v. Pa.* (1888), 127 U. S. 678; *Kidd v. Pearson* (1888), 128 Id. 1; *Eilenbecker v. Iowa* (1890), 134 Id. 31; and *Minnesota v. Barber* (1890), 136 Id. 313 and *supra*, page 807. The distinction pointed out by Justice FIELD (in his concurring opinion in this *Bowman case*, at page 506) between the *Mugler* and the *Bowman cases*, was drawn at the origin of the merchandise, as beyond or within the State boundaries, because of the principle established in *Brown v. Maryland* (*supra*, page 439), that the right to import from a foreign country, or to bring in from another State, carried with it the right to sell in the original package.

Justice MATTHEWS recognized that the judgment in the *License Cases* (*supra*, page 453) closely approached the ques-

tion in hand, but finally distinguished the present case upon the important point of the time when transportation terminated (page 479 of the opinion.) The law of Iowa sought to prevent that delivery, and a large part of the opinion was devoted to the vindication of the exclusiveness of the Constitutional power to regulate commerce (pages 486, 495, and Justice FIELD, concurring, page 500), without which it would be idle to discuss the moment when the State police power could attach (page 499.)

In another aspect the Iowa law was declared to be no immunity as an inspection law. *Turner v. Maryland* was unqualifiedly followed as already observed (*supra*, page 816.)

In still another aspect, the Iowa law was not recognized as a quarantine or sanitary regulation, as it singled out certain merchandise to be removed from the commercial commodities of the country. Here, the remarks of Justice CATRON, in the *License Cases*, (*supra*, page 457) as well as those of Chief Justice TANEY, were approved by both Justice MATTHEWS and Justice FIELD (pages 490, 501, 503 of the report.) The judgments in *RR. Co. v. Husen* (*supra*, page 801) and the more recent *Passenger Cases* (*supra*, page 465) all precluded the recognition of such power in the States, and the motive of the Iowa law could not save it from the condemnation of seeking to ward off the evils of intemperance by prohibiting interstate commerce (page 498 of the opinion.)

Justice FIELD (in his concurring opinion at page 502), went further and called attention to his dissent in *Mugler v. Kansas* (1887), 123 U. S. 623, 675, as indicating, without expressing, his opinion, that no State could prohibit the sale of merchandise which Congress might authorize to be brought into a State : for—

It is a matter of history that one of the great objects of the formation of the Constitution was to secure unanimity of commercial regulations and thus put an end to restrictive and hostile discriminations by one State against the products of other States, and against their importation and sale. [Quoting from *Brown v. Maryland*, the words on page 416, *supra*.] If the States have the power asserted, to exclude from importation

within their limits, any articles of commerce, because in their judgment the articles may be injurious to their interests or policy, they may prescribe conditions upon which such importation will be admitted, and thus establish a system of duties as hostile to free commerce among the States as any that existed previous to the adoption of the Constitution: *FIELD, J.*, concurring in *Bowman v. Chicago & N. W. R.R. Co.* (1888), 125 U. S. 465, 509.

As Chief Justice *WAITE* and Justices *GRAY* and *HARLAN* dissented in the *Bowman* case, it is not surprising that the two surviving Justices dissented in the *Original Package Case*, so much foreshadowed, and even decided (per *FIELD, J.*, at page 504) in the former case. In both instances, the *License Cases* were the test by which these Justices found a difference between the judgment of the Court and the exceptional principles recognized in *Gibbons v. Ogden* (*supra*, pages 428, 520,) *The Chestnut Street Bridge Case* (445, 534), *R.R. Co. v. Husen* (538, 801) and *Patterson v. Kentucky* (515, 742.)

XXVI.

Original Packages of fermented, distilled and other intoxicating liquors or liquids, are now subjected by Congress to the police power of the several States and Territories.

An Act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Approved August 8, 1890.

This is the so-called Wilson bill, which became a law during the preparation of a portion of this article. As it has been immediately challenged, and a decision of the Supreme Court of the United States may be expected at no distant

day, the intended discussion of this act may be deferred at this place. All the other articles which are capable of becoming original packages, are, of course, now deliberately suffered by Congress to remain under the various rulings of the Supreme Court which have been considered with some minuteness. For the proposed bill, with a general operation, failed to pass, and the efforts to prevent the introduction of dressed beef and to exclude drummers, if renewed, cannot profit by the moral excitement produced by the Original Package decision of 1890.

XXVII.

SUMMARY.

(The figures in the following sentences refer to the preceding pages.)

The extent of the subject and the advantage of a full statement of the facts of each case considered, have required the elimination of all decisions not connected with the sale of merchandise, or not declaring common principles in an instructive form. In this manner, there has been eliminated almost all consideration of the power to embargo commercial intercourse (427); ferries; the control of immigration (459); inspection laws (813); liquor laws (826); mail routes and post roads (477); navigable waters (745); laws governing pilots (474); port regulations; the power to lay protective duties on imports (427); quarantine laws (801); the regulation of the rates, tariffs, charges and other traffic arrangements by rail and water (438); the restraint of the slave trade (427); the taxation and regulation of telegraph, express, railroad, transportation, steamboat and other corporations (765) engaged in interstate commerce (799); rights obtained by treaty (427); and wharfage, except as briefly alluded to on pages 817-21.

The law declared in the cases considered in the preceding pages, rests upon the fundamental principle of the supremacy of the Constitutional power to regulate foreign and interstate commerce (425). No State power can, under any name or

theory (421), oppose or restrain (474), the immunity thus conferred upon the exterior commerce of the several States of the Union.

This supremacy was supposed by Kent and the New York jurists (430), to lie dormant until Congress positively regulated commerce, although the appropriate spheres of State and National action are defined for different purposes (473), and impinge upon each other only as they seek to regulate the same subjects (425). This is true in the choice of either definition of the police power of the States (411). The dormant theory, therefore, failed of recognition by the Supreme Court (435) as early as 1824, because it involved a claim of concurrent power (472) in the States to regulate commerce except where expressly restrained by the Constitution (436). Such strict construction has always been denied (418), and the resulting definition of commerce, in *Gibbons v. Ogden* (428), as commercial intercourse, has led the Supreme Court on to the declaration that the Constitutional power is active, and being supreme, is therefore exclusive (803).

An exclusive power to regulate commerce involves a choice of much or little regulation, so that Congress has the power to suffer commercial intercourse to be free of restraint (473), and inevitably, therefore, Congressional nonaction is as potent (464) as is the supremacy of Constitutional Acts, formally passed by both the House and Senate with the approval of the President or over his veto (428).

The exclusiveness of the Constitutional power to regulate commerce has been construed by the Supreme Court of the United States, as either absolute or relative (466), in order to prevent unnecessary prostration of State authority over subjects not requiring exemption on principle (468). The effect of this construction is to direct the student and jurist alike, to the decisions of the Court (753) as defining from time to time the bounds of State legislation affecting the commercial intercourse of our country (422). A general rule was formulated by Justice CURTIS, in *Cooley v. Port Wardens* (470), but its full effect has scarcely been realized until the *Original Package Case* (491) of 1890, on account of the more

popular, though previous judgment of the same Court in the *License Cases* (453). It would be an error, however, to overlook the power in Congress to legalize an interference with commercial intercourse (474), and in this way reverse a decree of the Supreme Court (477). The Court is not superior to Congress, and its construction is largely due to Congressional failure to act (421).

When Congress proceeds to act, the choice of means to be used is expressly (423) confided to it without its legislation being restricted to such laws as might be indispensably necessary, or any more than conducive to the exercise of the Constitutional power.

Congress cannot surrender its power over commerce, as by an act admitting a State into the Union (474), though it can adopt for the time being, such local regulations as are deemed suitable (472).

The power to regulate commerce cannot be exercised by Congress, without limit (741); for it may neither tax or lay a duty on exports from any State (424); nor prefer the ports of one State over those of another, though in making regulations for other purposes (797), a discrimination may be made between ports in the same State (478); and Congressional regulations of commerce must not be local (748) where general regulations are proper and necessary.

This Constitutional power to regulate commerce is not general but confined to three fields of action (420), as it is with foreign nations, among the States and Territories of the Union, including the District of Columbia (748), and with the Indian Tribes (721). In determining whether commerce falls into one of these divisions or is local, the fact of transshipment, or change of carriers, is insufficient of itself to fix the local character of the traffic (743) as the Court will look to the ultimate destination of the articles. Excepting these divisions of commerce, each State has entire control (448) over the business, trade (800), manufactures (722) and traffic carried on within its borders (435), not only as long as they are not parts of interstate or foreign commerce (743), but equally so when intended to, though actually not yet

become such parts (817). Consequently, a State may even prefer strangers above its own citizens (762), and generally may act until it passes the limits set by the Constitutional provisions for the due process of law (515) and for the equal rights of citizens of other States (750). These are the clauses usually invoked with the commerce clause, in cases of supposed interference with commercial intercourse.

From the fact that this local jurisdiction remains with the States, it follows that Congress cannot exercise police powers in the States (741), or elsewhere than in the Territories and other places within its exclusive jurisdiction. Hence, an act of Congress forbidding the sale of certain coal oil (741) is invalid in a State: and a patent granted by the United States, cannot authorize the sale of patented articles when forbidden by State enactments (741). Licenses are issued by the United States under the taxing and under the commerce powers (724). Under the latter they are regulations of commerce and confer the right to trade (431), so that they cannot be nullified by State laws (428). But under the taxing power, licenses do not confer any immunity from State regulation of the licensed business (721). Some examples will elucidate this difference between the two kinds of licenses. A coasting license is issued under the commerce power (428), but an Internal Revenue license, issued to a lottery ticket seller or a liquor dealer, is issued under the taxing power (721). A steamboat license is issued under the commerce power, and may be required to be taken by every boat carrying freight and passengers ultimately destined to a point without the State, though the boat navigates only waters within the State (743).

As already indicated (830), there is even a State control over outgoing and incoming commerce. This is a result of the division of the Constitutional power into absolutely exclusive and that which is merely relative. The general rule is in substance, that Congressional regulation (465) and non-action (466) alike, are exclusive of both direct interference by the States (453) and even local legislation for other purposes (739), where the subjects of foreign and interstate

commerce are, in their nature, national (453) or admit of but one uniform system or plan of regulation. All other outgoing and incoming commercial intercourse may be regulated by the State (445) until there is a collision with Congressional enactment (420). Hence, until Congress makes some regulation of the charges for the use of grain elevators and such other instruments of interstate commerce as are situate wholly within a State, licenses and charges may be prescribed by that State as matters of local regulation (797). This absolute exclusiveness of the Constitutional power prevents a State from declaring both what articles may be brought into its territory by a common carrier (824), and what products of another State may be owned or possessed within its territory (801): otherwise the States have entire control over their local affairs, such as the prevention of disease, pestilence and pauperism (457) so long as a single article or class of articles is not excluded from the State (806). Hence, the captain of an incoming vessel may be required to report his passenger list (448), including the name and quality of every person on board (452), but he cannot be compelled to pay any tax or fee (465), or to be responsible for any persons he may land as immigrants or interstate passengers (459). Similarly only diseased cattle, or those actually fit for quarantine regulations, and not all cattle coming from another State, may be excluded (801). And health regulations must be reasonable, and not prescribe an inspection of cattle such a brief time before slaughter, as to prevent the carriage of the carcasses from one State to another (801). The relative exclusiveness of the Constitutional power permits valid State legislation respecting pilots (466), inspection and quarantine or other health regulations. The courts and not the State legislatures are the proper organs of government to decide when such laws extend beyond the danger apprehended by the lawmakers, into the regulation of that part of interstate commerce over which the Constitutional power is absolutely exclusive (801).

Inspection laws are part of the State legislation embracing everything within the territory of the State which has

not been placed in the care and control of the United States (813), and is not, therefore, derived from any power to regulate commerce, but from the right to improve the quality of domestic articles before they enter into commerce (813). A State may, therefore, require tobacco casks to be weighed and measured at a particular place, before transportation out of the State, though no such requirements are exacted in respect to tobacco transported from place to place within the State (813). Consequently legitimate inspection laws relate to the quality of the articles, their form, or capacity, and the weight and dimensions of their packages, to be ascertained by a public officer at any reasonable place fixed by law (813). If these inspection laws are inequitable though legitimate, and the States enforce them, Congress and not the courts must interfere (813).

The States cannot regulate or forbid immigration (459), though they may enforce legitimate quarantine and poor laws so long as they do not attempt to lay a tax on immigrants (460).

The commerce to be regulated, is more than traffic (424) or the exchange of goods (433): it includes the article, the vehicle, the agent, and their various operations, and is therefore defined as a unit, comprehending every species of commercial intercourse (427), of persons and things (462) both outwards from a State as well as into its jurisdiction (748). This extended definition was one of the first required of the Court, and was made as the foundation for the further one that navigation is a part of the commerce to be regulated by Congress (428) as one of the instruments of commercial intercourse (434).

This regulation of navigation extends to the carriage of interstate and foreign passengers (459) and merchandise (743), not only on the high seas, but also on the bays, harbors, lakes, and all other navigable waters (459) of the United States (431). For the convenience of this carriage, Congress may authorize the construction of dykes and other structures (475), and, further, has the authority to decide between water and land carriage in the erection of bridges

and other obstructions (474). In this respect the States also are not excluded from a partial exercise of a power to bridge, dam and otherwise obstruct streams. This is a consequence of the division of the Constitutional power (830) and of the local authority of the States (831.)

The general rules respecting bridges, dams and other structures, are that the State has entire control over its own purely internal and nonnavigable waters (482); over other internal waters, the State may legislate until Congress positively regulates the interstate and foreign commerce upon and over such waters (483); over waters lying between two or more States, each State may legislate as to its soil until Congress interferes, unless a general regulation by Congress would be more appropriate (483).

The legitimate wharf dues are matters for local regulation, until Congress interferes, and may be measured by the capacity of the vessels using the wharves (817) notwithstanding the Constitutional denial to the States of the power to lay any duty of tonnage without the consent of Congress (425), as this prohibition was merely intended to protect the freedom of commerce. Consequently, a State law authorizing a municipality to collect wharfage from vessels laden with the products of other States and countries, but not from those laden with similar products of the State, is void (817) as a regulation of commerce.

What is an article of commerce can only be determined by the usages of trade (457), and a State cannot declare an article not to be the subject of commerce so as to exclude it (503). Such definition is not within the police power of the States (414). Hence, intoxicating liquors are merchandise which a common carrier cannot refuse to receive merely because the State into which they are consigned, forbids their carriage into its territory (824).

The instruments of commerce (450), the passengers carried (459), and the articles brought into a State (456), do not become subject to the State regulation of internal commerce as soon as they enter the territory of the State (823), or upon delivery to the consignee (489), or until each

instance of commercial intercourse with foreign nations or among the several States and Territories of the Union, has terminated (428). Such is the force of the word "among"; it cannot be satisfied by a final termination outside of (746), but only within (435), a State. Of this termination, the test for merchandise is the action of the importer or consignee in breaking up the original packages in which the articles have been brought into the State (443), or the use of the articles as property in the State (491). For the right to import or to bring into the State, includes power in the importer or consignee to sell the articles in their original packages (443).

An original package is a bale, bundle, crate, cask, box, or other parcel of goods, packed for importation from a foreign country, or for transportation from one State or Territory of the Union to another (443); it does not receive this appellation from having paid a tax or license to the United States (721).

Imports and exports are articles of foreign commerce carried into or to be shipped away from a State or Territory (823); they are not terms applicable to articles carried from State to State (727), a distinction of importance in apprehending the extent of State taxation, as distinguished from the operation of State police power. For a State may not tax an import (443) or an importer (439) but may subject original packages from other States of the Union (727) to the same taxation as other property in the State (735), so long as discrimination is avoided. Similarly, auction sales of original packages of foreign origin, cannot be taxed either directly, or indirectly by way of license exacted from the auctioneer: but goods produced in one of the States of the Union may be taxed while awaiting sale in another or when offered at auction (810).

In all cases, a State tax upon an instrument of commerce, as a drummer (747), importer (439), dealer or agent (764), is regarded as a tax upon the articles offered for sale, whether they are imports (439) or carried from another State (734),

and whether the agent or other person or thing taxed, is essential to commerce or merely advantageous (748).

A State cannot tax foreign or interstate commerce, by laying charges upon the business of transportation, or the receipts from transportation (761), upon immigration (460), or travelers from State to State (463), upon any kind of commercial intercourse passing through its territory or merely contracted to occur among other States (748), upon articles produced in another State (728) because of their origin, or operating to prevent commercial intercourse of person and things (461) or to discriminate against articles because of their origin out of the State (752). Hence, State taxes cannot be laid upon exports (425), or goods purchased for removal to a foreign country (824), though taxes may be collected from original packages of domestic goods which are afterwards actually exported (732). This difference arises from an intention to export counting for naught, unless the articles are actually in some degree on their way, either by delivery to a common carrier or some similarly significant act (821). But a temporary stoppage of the transportation, by transshipment (743) or by impediments, as low water in a logging stream (821), do not suffer the State to lay taxes.

There is no restriction upon State taxation upon property within its jurisdiction (732), certainly not on account of the nonresidence of the owner (821), so long as the Constitutional freedom of commerce is not interfered with by discrimination, either intentional or in effect (824). Of course, the Constitutional prohibition against a tonnage tax (425) is a special exception to this general statement, for local taxation of vessels by their capacity, instead of by their value, is unconstitutional (817).

A general State tax or license may be laid upon a kind of business whose subjects may enter into interstate and foreign commerce, so long as the commerce itself is not made a matter of privilege (810). Consequently, a drummer traveling for a resident merchant cannot be taxed discriminatively because he sells the products of another State (735): and if

he travel for a nonresident firm, he cannot be taxed at all (748). Similarly, the agent of a distant interstate railroad may solicit passengers for his road without paying a State license fee (748). And a nonresident cannot be required to pay a tax measured by his stock of goods in another State, or by his capacity to carry on his business all over the United States, and not merely within the taxing State (747).

Upon the question of a remedy, the United States Courts may enjoin an interference with commercial intercourse which amounts to a nuisance or creates irreparable damage, notwithstanding the absence of Congressional action either upon the particular subject or generally, prohibiting and punishing nuisances (474). In such case a State has been allowed to sue for an injunction against obstructions to commercial intercourse authorized by another State (474).

Finally, it may be observed that the principles of the *License Cases* appear to have been denied within five years after their formulation (753) and are now considered as distinctly overthrown (507). A recognition of this fact and an apprehension of the more equitable rule first formulated in *Cooley v. Port Wardens* (466) would undoubtedly render the whole subject of the law governing an original package, one of easy comprehension, as well as of rational construction of the words of the Constitution.

JOHN B. UHLE.

*Supreme Court of Indiana.*MORRIS *et al.* v. POWELL.

When the Constitution defines how a right may be exercised, it prohibits the exercise of that right in some other way.

Registration laws must be uniform, impartial and reasonable.

Therefore, a statute requiring those voters who have been absent from the State six months or more, or who have gone into another State with the intention of voting therein, to register, ninety days before the election, a notice of their intention to become qualified electors with the clerk of a court, when the Constitution only requires sixty days' residence in the county; or, if an elector is absent from the State for six months on business of the State or the United States, requiring him to produce a certificate from the county auditor to the effect that his name has continuously, since his departure, been on the tax duplicate, and that he is still a tax-payer, is unconstitutional. MITCHELL, J., dissenting in part.

Although the Constitution of a State provides that the Legislature shall enact a registration law, yet the failure of the Legislature to enact such a law does not deprive an elector of his right to vote at an election.

The Legislature cannot require an elector to possess qualifications not required by the Constitution, when that instrument has prescribed his qualifications.

It cannot require a property qualification, nor a longer residence than that required by the Constitution.

When the Constitution defines the qualifications of voters, those qualifications cannot be added to or changed by legislative enactment.

When the Constitution defines the qualifications of an elector, and provides that if he possesses these qualifications, "and has been duly registered according to law," he shall be entitled to vote, registration is as much a qualification as either age or residence.

One elector, or one class of electors, cannot be required to register, while another has the right to vote without registering.

Appeal from the Circuit Court of Henry County.

Chas. S. Herby for appellant.

M. E. Forkner and *A. C. Harris* for appellee.

OLDS, J., October 8, 1890. This action was brought by Simon T. Powell against Joshua I. Morris, Auditor of Henry County, and William H. Elliott, to enjoin the payment of an account for books furnished the County for registering voters, under section thirteen of the election law of 1889, (Acts of 1889, page 163; Elliott's Supp. § 1335,) and it

involves the validity of said section. A demurrer was filed by the appellant to the complaint and overruled, and, he refusing to plead further, judgment was rendered on demurrer in favor of appellee. The section of the law reads as follows :

SEC. 13. Each elector shall vote by ballot in the precinct wherein he resides. Any person who, having been a resident of Indiana, shall have absented himself from the State for a period of six months or more, or who shall have gone into any other State or sovereignty with the intention of voting therein, or during any absence in any other State or sovereignty shall have voted therein ; and also any person who shall not have been a *bona fide* resident of this State and of the county in which he resides at least six months before any election, shall, before being entitled to vote at any election in this State, register a notice of his intention to become a qualified elector therein, in the office of the clerk of the circuit court of the county in which he resides. Whoever shall be absent from the state for a period of six months or more on business of the State, or of the United States, shall, at the time he offers to vote, produce a certificate from the county auditor that his name has continuously, since his departure from the State on such business, been upon the tax duplicate of said county for the purpose of taxation during his absence from the State, and that he is still a tax-payer in said county ; and, failing to produce such certificate, such person shall not be permitted to vote. Such registration shall be made at least three months prior to any such election, and the notice shall state such person's name, age, and place of residence (by which shall be understood his lodging-place), and the notice shall be in the form following, and sworn to before such clerk :

State of Indiana, } ss.
 ——— County

I, ———, the subscriber hereto, hereby declare my intention to become a qualified elector under the laws of Indiana ; that I was ——— years of age on my last birthday ; that my lodging-place is now ——— (here insert exact location), and I am a *bona fide* resident of the precinct in which I lodge.

Provided, That the provisions of this section respecting such registration and notice shall not apply to any voter who, six months or more previous to any election, shall have registered with said clerk a notice declaring his intention to hold his residence in this State during a contemplated absence, and that during such absence he will not exercise the right of suffrage elsewhere, and which notice shall be as follows, and shall be sworn to before said clerk :

State of Indiana, } ss.
 ——— County,

I, ———, the subscriber hereto, a qualified voter of ——— (here insert the name of his precinct, ward, township, town, and city), in said

county, intending to absent myself, do hereby declare my purpose to hold my residence as a voter in said State, and that I will not exercise the right of suffrage elsewhere during my absence.

On the filing of any notice, as provided for in this section, it shall be the duty of such clerk to enter the name and residence of said elector, and date of the filing of said notice, in a book furnished for said purpose, to be open at all times to the inspection of the public, and safely preserve said original notice, and deliver a certified copy of the same to the elector so registering; and, on demand of any challenger or member of the election board, such elector shall be requested to produce the same before being allowed to vote. No person shall register for any other person, or in the name of any other person, or present the copy of the register for any other person at a polling place, or induce, hire, or advise any other person not to register, who may be required to register as above.

Any person violating the provisions of this section, or who shall vote or attempt to vote without having been registered when required to do so as above, shall be guilty of a felony, and, upon conviction, shall be imprisoned in the State prison for not less than one nor more than five years, and be disfranchised for any determinate period. No elector shall be at any cost or charge for such registration or certificate thereof, and the clerk shall be allowed twenty-five cents, and no more, for each registration and certificate thereof, to be in full for all services connected therewith, which allowance shall be made out of the county treasury by the board of county commissioners, on itemized statements sworn to by said clerk.

Article two, section one, of the Constitution of this State, declares that "all elections shall be free and equal;" and section two of the same article defines in unambiguous language who shall be entitled to vote.

SEC. 2. In all elections not otherwise provided for by this Constitution, every male citizen of the United States, of the age of twenty-one years, and upward, who shall have resided in the State during six months, and in the township sixty days, and in the ward or precinct thirty days, immediately preceding such election; and every male of foreign birth, of the age of twenty-one years, and upward, who shall have resided in the United States one year, and shall have resided in this State during the six months, and in the township sixty days, and in the ward or precinct thirty days, immediately preceding such election, and shall have declared his intention to become a citizen of the United States, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote in the township or precinct where he may reside, if he shall have been duly registered according to law.

Section four of the same article provides that "no person shall be deemed to have lost his residence in the State

by reason of his absence, either on business of this State or of the United States."

Under the Constitution a person must have certain qualifications to entitle him to vote, viz. : He must be a male citizen of the United States ; or, if of foreign birth, must have declared his intention to become a citizen of the United States conformably to the laws of the United States on the subject of naturalization, and have resided in the United States one year. He must be twenty-one years of age, and have resided in the State six months, and in the township sixty days, and in the precinct thirty days, and he must be duly registered according to law providing for the registration of voters. If a person possess all these qualifications he is entitled to vote ; but if there be any one of these qualifications which he does not possess, then he is not entitled to vote, except if there be no legally enacted statute providing for the registration of voters, then he is exempt from the duty of registering ; or, rather, the voters of the State cannot be disfranchised by reason of the failure of the Legislature to comply with a constitutional mandate.

In 1881, the electors of the State, by a majority of over eighty-seven thousand, amended section fourteen of article two of the Constitution so as to provide that the "General Assembly shall provide for the registration of all voters entitled to vote," and it is by reason of an omission or a refusal on the part of the General Assembly to obey and comply with this constitutional mandate that the voters of the State have exercised the right of suffrage without registration since the adoption of this Amendment. That the General Assembly has the power to enact a law providing for a uniform system of registration of all voters, we think cannot be controverted, and that it is made the duty of the General Assembly, by the Constitution, to enact a law providing a reasonable, uniform, and impartial system for the registration of all voters must be conceded ; but section thirteen of the present law imposes certain duties upon a certain class of voters, and requires certain qualifications of

other classes, while a much larger portion is not included within its provisions or affected thereby.

The question is presented as to whether or not the Legislature can impose the obligations which it seeks to do by this section, on the class of voters therein specified, and to another class add a qualification not required by the Constitution to entitle them to vote. This section attempts to impose an obligation upon all persons who, being residents of the State of Indiana, shall absent themselves from the State for a period of six months or more, or who shall have gone into any other State or sovereignty with the intention of voting therein, or who during an absence in any other State or sovereignty have voted therein, and upon all persons who shall not have been *bona fide* residents of this State, and of the county in which they reside, at least six months before any election, the duty of registering a notice of their intention to become qualified electors in their respective precincts in the office of the clerk of the circuit court of the county in which they reside at least three months prior to any such election, and makes it a felony, punishable by imprisonment in the State prison, to vote, or attempt to vote, without having been so registered. It is also attempted by this section to make the right to vote of certain electors of this State, who shall be absent from this State for a period of six months or more, on business of the State or of the United States, to depend upon their producing, at the time they offer to vote, a certificate of the county auditor that their names have continuously, since their departure from the State, been upon the tax duplicate of said county, for the purpose of taxation, during their absence from the State, and that they are still taxpayers in said county.

This latter clause seeks to add, in addition to the qualifications required by the Constitution, a property qualification to a certain class of voters, for it provides that persons being absent from the State on the business of the State or United States shall be taxpayers in the county in which they reside, and that they shall keep their names on the tax dupli-

cate during their absence, and shall furnish a certificate of the auditor to that effect before they shall have a right to vote. None of the names of voters except able-bodied men between the ages of twenty-one and fifty years, and persons owning taxable property in the county, properly appear upon the tax duplicate, and [others] are not taxpayers in the county; so that a voter over fifty years of age, being absent on business of the State or United States, and owning no taxable property in the county, is not a taxpayer in the county, and he could not procure such a certificate from the county auditor, and on voting, or attempting to vote, he would, by this section, be guilty of a felony.

The only reasonable construction to be placed upon this part of the section is that, in addition to the qualifications to vote as required by the Constitution, it adds another—a property qualification—that he shall own taxable property, within the county where he resides, and shall keep his name upon the tax duplicate. The Legislature has no such power. That, when the people by the adoption of the Constitution, have fixed and defined in the Constitution itself what qualifications a voter shall possess to entitle him to vote, the Legislature cannot add an additional qualification, is too plain and well recognized for argument, or to need the citation of authorities.

The principle is elementary that when the Constitution defines the qualification of voters, that qualification cannot be added to or changed by legislative enactment. That our Constitution does define the qualification of voters, and that the part of section thirteen, *supra*, providing that certain persons shall make proof of the fact that they are taxpayers of the county, is an attempt to add an additional qualification, will admit of no doubt; and it is, therefore, unconstitutional and void. This is in accordance with the holding of this Court in *Quinn v. State* (1871), 35 Ind. 485. The Court, in this case, says:

In *Rison v. Farr* (1865), 25 Ark. 161, the Court held that where the Constitution, as in that State, fixes the qualifications of and determines who shall be deemed qualified voters, those qualifications cannot be added to by the Legislature.

In the case of *Quinn v. State*, it is held that a law providing for a residence of twenty days in the township, was in conflict with the Constitution of this State then in force, which did not require a residence for any definite length of time in the township. *St. Joseph, etc., R. Co. v. Buchanan County Court* (1867), 39 Mo. 485; *People v. Canaday* (1875), 73 N. C. 198; *Page v. Allen* (1868), 58 Pa. 338; *State v. Williams* (1856), 5 Wis. 308; *Kinnceen v. Wells* (1887), 144 Mass. 497.

That portion of the section providing for certain persons to register before being entitled to vote, was evidently intended, and we think it must be regarded, as an attempt to create a system of registration, whereby persons coming within its provisions shall be required to register before being entitled to vote. It is true it can hardly be said it creates a court or board with authority to determine who are legal voters and have the right to vote and enter their names upon a register as legal voters. Yet it does provide for a mode of registering and keeping a record of certain classes of voters, and requires such voters to produce a certificate of such registration before being entitled to vote, and it may be properly regarded as attempting to create a system for the registration of certain classes of voters. It is designated in the section as a registration.

Courts differ as to the effect of a law requiring the registration of voters in States wherein the Constitution defines the qualifications of voters, and is silent upon the question of registration; some courts holding registration to be a mere regulation as to the mode of exercising the right of suffrage, while other courts, and we think the better reasoned opinions, hold it to be adding a qualification. But, whatever may be the true rule where the Constitution is silent, we think there can be no doubt that, under the Constitution of this State, registration under a proper law constitutes a qualification. When the Legislature of this State enacts a law providing for a reasonable, uniform, and impartial registration of all voters in this State, then registration will constitute a qualification which the voter must possess

to entitle him to vote, the same as any of the other qualifications defined by the Constitution. When such a registration law is enacted, the voter then must possess the qualification of being a male citizen of the United States, twenty-one years of age, or over, and must have resided in the State six months, in the township sixty days, in the ward or precinct thirty days, and must be duly registered according to law. If he possess all these qualifications, he can vote; if he lacks either, he cannot vote. The Constitution, in defining the qualification of voters, makes one of the qualifications to be:

If he shall have been duly registered according to law.

When a valid law for the registration of all voters shall have been enacted as required by the Constitution, then registration will be as much a qualification as age or residence. The qualifications of voters must be uniform. One voter must possess the same as another, and he need possess no more. Where, as under our Constitution, registration is a qualification, one voter cannot be required by a law to register while another has the right to vote without registering. Indeed, such a discrepancy would invalidate a law even if the Constitution was silent as to registration.

Under the Constitution of this State a male citizen of the United States over the age of twenty-one years, who has been a resident of this State for six months prior to any election, may, up to sixty days prior to such election, exercise the right to move and change his residence from county to county, and from township to township, within the State, as often as he may desire, but from that time forward he must have a fixed residence in the county and township where he intends to vote; but he may still continue to change his residence from precinct to precinct up to thirty days prior to the election, after which time he must have a fixed residence in the precinct to be entitled to vote. The Constitution grants to every voter the right of changing his intention and residence from county to county, and township to township, up to sixty days before an election, and of

still continuing to change, if he so desire, from precinct to precinct up to thirty days before an election. Nothing is required of the voter up to sixty days prior to the election, except that he reside in the State. The Constitution does not require of the voter that he fix or designate his residence in any particular township up to sixty days prior to an election. From that time forward he cannot change his residence from one township to another if he desires to vote. The same is true in regard to the precinct up to thirty days before an election. The voter is left free to change his intention and residence up to these dates. These privileges belong to, and are exercisable by, every qualified voter of the State, whether he be temporarily absent from the State for a day, a month, a year, or even longer, or not absent at all.

A mere temporary absence does not, in any way, affect his residence, or his right to vote, under the Constitution; but section thirteen, *supra*, provides that persons who absent themselves from the State for a period of six months, and persons who have not resided in one county for six months, before any election, shall register, as provided by such section, ninety days before the election, to entitle them to vote, and they are required to produce the certificate of registration before voting. While this section is indefinite in some of its provisions, and its meaning and purpose somewhat obscure, yet it seems to us that the reasonable construction to be given to it, is that such voters shall declare their intention to become qualified voters, and fix and designate the respective precincts of which they are residents, and entitled to vote, ninety days before an election, and that, upon presentation of their certificates of registration, they shall have the right to vote in the precinct so designated; and that it requires of such voters that they designate their voting precinct ninety days prior to an election, and is, in fact, requiring a fixed residence in the precinct ninety days previous to an election, and, in this particular, at least, it is an abridgment of the rights of such voters, and is in direct conflict with the Constitution.

It seems to us that the construction we have placed upon this part of the section is the only reasonable construction it will bear. It certainly was not the intention of the Legislature to require such voters to designate their particular place of residence, even to their exact lodging-place, as required by the notice, in some voting precinct other than that in which they would have a right to vote, or, in other words, to require them to designate their particular lodging-place in one precinct ninety days before an election, and yet recognize the right of such voters to change their residence sixty days after registering, and vote in another precinct, and make the evidence of the registration proof of their right to vote in a ward or precinct other than that designated in the notice of registration. This section also provides that the registration books shall be kept open at all times for the inspection of the public. Certainly the object of such registration, and the keeping of the books open to the inspection of the public, is for the purpose of requiring such voters to fix and designate their residence and voting places ninety days before the election, and affording information to the public as to the residence and lawful voting places of such persons. But if we are in error in this construction, the provision is obnoxious to the Constitution, and void for other reasons.

It is a well-settled rule of law that "when the Constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition, or to extend the penalty to other cases." This language of Judge COOLEY is quoted with approval by the Court in the case of *Quinn v. State*, *supra*. See, also, *Mechem*, Pub. Off. § 148; *State v. Williams*, *supra*; and *State v. Tuttle* (1881), 53 Wis. 45. In other words, when the Constitution commands how a right may be exercised, it prohibits the exercise of that right in some other way: if exercised at all it must be exercised as commanded by the Constitution.

The Constitution of this State, § 14, art. 2, provides that the "General Assembly * * * shall provide for the

registration of all persons entitled to vote." This provision defines how the Legislature shall exercise the right of requiring the registration of voters; that is, by providing that all voters shall register. This constitutional mandate is an implied prohibition against providing for the registration of any class, or for only a part of the voters, and this is consistent with the great weight of authorities upon the question of the validity of registration laws, which hold that such laws must be impartial, reasonable, and uniform. Judge COOLEY states the law to be that "all regulations of the elective franchise, however, must be reasonable, uniform and impartial. They must not have for their purpose directly or indirectly to deny or abridge the constitutional right of the citizen to vote or unnecessarily to impede its exercise. If they do they must be declared void." Cooley, *Const. Lim.* (5th Ed.) 758. See, also, authorities hereinbefore cited.

In a well-reasoned opinion in the case of *Attorney General v. City of Detroit* [decided in the Supreme Court, Michigan, Dec. 28, 1889], the authorities on the question are fully reviewed and considered, and it is held by the Supreme Court of Michigan in that case, that a registration law is unreasonable and void if it provides for but five registration days during the year, at one of which the elector must make personal application for registration; that it thereby disfranchises persons who are ill or absent on registration days, but who would be able to vote on election days. It also holds the same act void because it is not impartial, in that it requires a naturalized voter to produce his certificate of naturalization, or show, by evidence other than his own oath, that such certificate was issued, while it permits a native-born citizen to prove his right to vote by his own oath. The Court in that case, after citing and reviewing numerous authorities, says:

These authorities all tend in one direction. They hold that the Legislature has the right to reasonably regulate the right of suffrage, as to the manner and time and place of voting, and to provide all necessary and reasonable rules to establish and ascertain by proper proof the right to vote of any person offering his ballot, but has no power to restrain or

abridge the right or unnecessarily to impede its free exercise. This law before us disfranchises every person too ill to attend the board of registration, and unreasonably and unnecessarily requires persons whose business duties, public or private, are outside of Detroit, to return home to register, as well as to vote, making two trips, when only one ought to be required.

See *Daggett v. Hudson* (1885), 43 Ohio St. 548.

Indeed, section thirteen, *supra*, seems to be aimed at a certain class of voters who may be absent from the State for a period of six months, either for pleasure or on business of a public or private character, and those at all times within the State who may be compelled, in order to obtain employment or for other lawful purposes, to change their residence from one county to another within the six months next preceding an election, and it imposes a burden upon them which is not imposed upon other voters, and changes their constitutional privileges and rights. It requires them to designate their particular residence and voting precinct, and prohibits them from again changing it, at a time when, under the Constitution, they are not required to do so. It imposes extra burdens and hardships on these classes of voters. In this respect it is both unreasonable and not impartial. Under the Constitution, the rights of voters who are required to move from one county to another within six months and prior to sixty days before an election, in order to obtain employment or for other lawful purposes, and those who are compelled to be temporarily absent from the State for six months, or longer, to earn a living for themselves and families, or to recuperate their health, or for other proper motives, are as sacred under the Constitution as those whose circumstances are such as not to require them to change their residence to seek employment, or to be absent from the State for that or any other lawful purpose. The Constitution guaranties the same rights to all voters who are *bona fide* residents of the State.

If once admitted that the Legislature has the power to enact a law requiring persons who are absent from the State six months to register ninety days before an election, why may not a law be valid requiring persons who are absent

from the State three months or one month or one day also to register? And if a law requiring a registration ninety days before an election is valid, why not a law requiring a registration six months, one year, or even a longer time before an election? If a law requiring all persons who are absent from the State six months to register, and none others, is valid, why would not a law requiring all foreign-born citizens, or all persons engaged in farming or manufacturing, and none others, to register, be valid? If this law is valid which requires all persons to register who are residents of the State six months, but not residents of the county six months, prior to an election, why may not the Legislature enact a valid law requiring persons moving from one ward to another at any time within six months, and none others, to register? Indeed, it seems to us to be beyond controversy that if the present act can be upheld, aimed, as it is, at a class of traveling men, and men whom business of a public or private character, or ill health, may take from the State six months, and persons who may be required to move from one county to another to obtain employment within six months preceding an election, and imposing, as it does, a burden upon these classes of citizens which is imposed upon none other, then the Legislature may enact a valid law relating to any class, designating them by nationality, place of birth, religious belief, professional or business pursuits, and require them, and none others, to register. If this law, which requires a registration of this class of citizens ninety days before an election, is valid, then any class of voters may be singled out and burdened, and duties imposed upon them which are not imposed upon others, and obstructing their right of suffrage as given to them by the Constitution of the State. It matters not whether this provision of the law be termed a registration of voters or a provision requiring certain proof of the class of voters named to entitle them to vote. In either event the effect is the same, for it requires proof of the qualifications to vote, which the voter under the Constitution does not have to possess, and the effect of the law is the same, and it

changes and abridges the rights of the classes of voters designated. We believe this section of the law to be in contravention of the Constitution, in opposition to all authority, and illegal and void.

As we have said, the Legislature has the right to pass a law requiring a registration of all voters, and the Constitution expressly requires the passage of such a law. But under the provisions of the Constitution, it must apply alike to all voters. One class of voters cannot be required to possess qualifications which are not required of all others. Under the Constitution, voters may change their residence from precinct to precinct up to thirty days prior to an election. This right cannot be impaired or taken from them by legislative enactment, and, until that time has occurred, they cannot be required to designate their intended residence, and voting precinct, at a future election. Up to that date they have the right to change their intention and place of residence as often as their circumstances may require, or as they may choose. The right to so change their intention and residence is given to every voter by the Constitution, and cannot be abrogated or interfered with. The authorities universally hold that registration laws must be impartial, uniform, and reasonable, giving to all who have a right to vote a fair and reasonable opportunity to exercise such right. The Constitution not only confers upon the General Assembly the power to make illegal voting an impossibility by a proper system of registration, but it makes it the imperative duty of that body to exercise that power. The imposition of unauthorized burdens and qualifications not authorized by the Constitution upon a part of the citizens of the State is not an exercise of that power, and while we would regret to declare void any law having for its object the purity of the elections, we cannot so far forget our duty as to uphold a law so plainly in conflict with the fundamental law of the State as the section of the law under consideration.

The provisions of the section we have particularly considered and discussed render the whole section void, and we deem it unnecessary to further discuss the other portions of

the section: *State v. Denny* (1888), 118 Ind. 449; *Baldwin v. Franks* (1887), 120 U. S. 678; *Norton v. Shelby Co.* (1886), 118 U. S. 425. The conclusion we have reached being in harmony with the holding of the Circuit Court, it follows that the judgment must be affirmed.

Judgment affirmed, with costs.

ELLIOTT, J., (*concurring*.) The questions for decision, although they arise on a single section of a statute, are of the greatest importance, inasmuch as they concern the highest right of citizenship; and it is, therefore, not improper that separate opinions should be expressed. No other questions face us except such as arise upon section thirteen of the election law of 1889, and the decision of those questions does not affect other provisions of the Act, nor can it do so, for the section is an independent one, and its downfall carries no other part of the Act. Nor do I deem it necessary for us to decide whether there are not some provisions of the section which, if separated, and put in proper form, might not be valid, for the entire section, with its provisions interlocked beyond the power of severance, is before us for judgment, and we can only give judgment upon the section as it is written: *Griffin v. State* (1889), 119 Ind. 520; *Baldwin v. Franks* (1887), 120 U. S. 678.

It is proper to say, by way of introduction, that the question is what a Legislature may do, acting under a written Constitution which gives it all the power respecting the right of suffrage that it possesses, and not what may be done by Congress or by a Territorial Legislature acting under a law of Congress, nor what may be done by the people in framing or amending a Constitution.

The thirteenth section of the act of 1889, construed as I think it must be, requires one who has not resided for six months in the county where he claims the right to vote, to register his intention to become a voter ninety days before the election, thus requiring of the citizen two things, namely: That in order to be entitled to register he shall have resided in the county six months; and that he shall register his in-

tention to become a voter ninety days before the election. He is required by these provisions to reside in the county in order to acquire the character of a voter a much longer time than the Constitution requires, for it requires a residence of only sixty days. It is entirely safe to affirm that no one will question the proposition that the Legislature has no power to require a longer residence than that fixed by the Constitution. The affirmation of this proposition leads, beyond the possibility of cavil, to the conclusion that the provisions referred to are utterly destitute of force. There are, however, other objections to the validity of section thirteen which seem to me to be insurmountable, and these objections go to the entire section, as its provisions are so interwoven as to be incapable of severance, and are, to my mind, so palpable that it is impossible to avoid perceiving them or to escape their force.

It may not be improper to preface the direct statement and discussion of these objections by affirming that it is not because the Legislature does not possess power to enact a general registry law that section thirteen is invalid, for no one who studies the language of the Constitution, or heeds the history of the amendments of 1881, can doubt that it was the purpose of the people to invest the Legislature with power to enact a general registry law. But, while this is true, it is also true that no other conclusion will square with the judgments of candid men than this: The Legislature can enact only such a law concerning the right of suffrage as the Constitution authorizes. This, therefore, is the central question: Is the thirteenth section of the election law of 1889 such an enactment respecting the right of suffrage as the Constitution authorizes? The question is one of power. If the Constitution authorizes such enactments as those contained in section thirteen, the power exists, and the section must stand; if the Constitution does not authorize such a law, the power does not exist, and the section must fall. With questions of policy or expediency the courts have nothing to do, but it is their duty to determine whether there is or is not power to enact such a law.

The power which the General Assembly assumed to exercise, is not an ordinary legislative power, for, in assuming to legislate upon the subject of the qualifications of voters, that body entered into the domain of those in whom the original power resides, and from whom all legislative powers are derived. The people control the subject of the right of suffrage, and legislative assemblies have only such power over that subject as the people have granted them by the organic law. That the Legislature cannot add to the qualifications of voters is a proposition upon which there is no diversity of opinion: Cooley, Const. Lim. 78. It would be strange, indeed, if the Legislature could add qualifications to those prescribed by the Constitution, for the right of suffrage is a political right, and it is the right of a sovereign. The people are above the Legislature, and they are there because the Legislature has no power to abridge or qualify the sovereign right of suffrage.

Section thirteen violates the Constitution by assuming to classify the voters of the State, and by adding qualifications to those prescribed by the Constitution. It assumes to divide the voters into taxpayers and nontaxpayers, and to add to the requirements of the Constitution, the requirement that the citizen shall be recorded as a taxpayer. It violates the Constitution, by assuming to classify voters into those who remain continuously in the State, and those who temporarily absent themselves from it. Where the Constitution makes a classification, a different one cannot be made by the Legislature. Our Constitution does make a classification, for it specifically provides who shall be eligible to vote. Where the Legislature exercises the power conferred upon it, and enacts a registry law, then legislation is essential to qualification; but where there is no such law, registration cannot be made essential, for in the absence of a registry law the sole qualifications of a voter are citizenship, age and residence. The General Assembly has no power to enact a law operating through a classification exclusively its own. This is indeed, a corollary of the proposition that it has no power to classify voters except by following the Constitution. Under

the Constitution, the Legislature has power to make two classes, registered and unregistered, but it cannot create a third class: *Attorney General v. City of Detroit* [decided in the Supreme Court, Michigan, Dec. 28, 1889]. If the power to classify exists in one case it exists in all. No one will deny that if the Legislature has power over a subject, it is master of its own discretion, and may enact any law it chooses. Grant the power, and the discretion is unlimited. If the Legislature has power to make the classification attempted in section thirteen, then it may provide that only naturalized citizens shall register, or that farmers shall register, and no others, or that commercial travelers, temporarily absent in the line of their business, shall make affidavits, and record their names, although such things may be required of no other citizen. In short, if the power exists, the Legislature may make any classification it pleases. To my mind it is perfectly clear that it can do no such thing. It cannot, in any form, classify the fundamental political right of suffrage except as the Constitution expressly authorizes it to do. Such a right is infinitely higher than legislative authority can climb. No matter what form legislation may assume, it is utterly void if it touches upon the right of suffrage in a mode not authorized by the Constitution. The name given the legislation adds nothing, for a name can no more change its substance than a name can change the odor of a rose.

The provision of section thirteen assuming to impose upon a citizen who has resided in the State for the period prescribed by the Constitution, the duty of making an affidavit declaratory of his intention to become a voter, is in violation of the Constitution; and so, too, is the provision which assumes to require a citizen who has been temporarily absent to swear that he has not voted elsewhere. A citizen who does what the Constitution requires, cannot be required to do more. If he fixes his character as a voter by a residence for the time designated by the Constitution, the incidents inseparably connected with that character are beyond legislative touch. The principle here asserted has been declared by our own, and by other courts. We must adhere

to it or overrule our own decisions, and disregard those of other states: *Quinn v. State* (1871), 35 Ind. 485; *Feibleman v. State* (1884), 98 Ind. 516; *Rison v. Farr* (1865), 24 Ark. 161; *Davies v. McKeely* (1870), 5 Nev. 369.

It is no answer to many of the propositions I have affirmed, to assert that the classification attempted is valid because all who belong to a designated class are put upon an equality; so that, if it were conceded that the assertion responds to some of the propositions affirmed, and is valid, the act nevertheless remains undefended, for any one of the propositions affirmed is fatal to its validity. But it cannot be justly conceded that the classification is valid. When the question is examined it will be found that the proposition that the equality of the classification rescues it from condemnation has not the poor merit of plausibility. It is, indeed, so thinly appareled even in plausibility that when brought to the touchstone of principle all semblance of strength vanishes. The General Assembly has no power to classify voters except as the Constitution provides, no matter what system it may adopt. This is so for the invincible reason that the prerogative of conferring and defining the right of suffrage is that of constitution makers, and not that of the creatures of constitutions. The electors who frame constitutions, and give being and power to Legislatures, are above the created things, and legislators cannot reach above themselves to the source of their power, and the authors of their existence, for the purpose of enlarging or restricting the sovereign right of suffrage. If it were otherwise legislators would be the masters, and masters they are not. If the Legislature can limit or even define the right of suffrage then it is greater than its constituency; but it can do nothing of the kind, for the right of suffrage is not subject to legislative power. The right of suffrage is a political right of the highest dignity. It is a right of which, as the Courts have declared, no department of government, nor all of them combined, can divest the citizen otherwise than in the mode, and to the extent, expressly authorized by the Constitution: *State v. Adams* (1829), 2 Stew. (Ala.) 239.

It is because the right of suffrage is a political right abiding in the fountain of power that the Legislature cannot lay so much as a finger upon it except when expressly authorized by the organic law, and for this reason it is that the Legislature cannot make a classification of its own, no matter whether there is or is not equality. It is because the right of suffrage is a political right, as has been decided by the supreme court of the United States, and by other courts, that the provisions of the Constitution respecting the bestowal of special privileges and immunities have no application to legislation upon that subject. These decisions demonstrate the proposition that those provisions apply only to rights in the nature of property interests, and not at all to political rights: *Minor v. Happersett* (1874), 21 Wall. (88 U. S.), 178; *Bradwell v. State* (1872), 16 Wall. (83 U. S.), 138; *Amy v. Smith* (1822), 1 Litt. (Ky.) 342; *Anderson v. Baker* (1865), 23 Md. 531; *In re Taylor* (1877), 48 Md. 28; *Brown v. Hummell* (1847), 6 Pa. 86.

To me it seems very clear that neither the decisions made under those constitutional provisions nor the provisions themselves can have the remotest relevancy to cases involving only high political rights of which constitutions are the framers and rulers. The right of suffrage is one for the consideration of the people in their capacity as creators of constitutions, and is never one for the consideration of the Legislature, except in so far as the Constitution authorizes a regulation of its mode of exercise. The people create, define, and limit their own right to vote. No Legislature can do that for them, although the Legislature may be authorized to regulate the mode of exercising this right. Power to regulate the exercise of the right is not power to legislate upon the substantive right itself. The right is a transcendent one, and is far beyond legislative dominion. It would, therefore, be illogical in the extreme to assert that the framers of the Constitution meant to prohibit class legislation upon a subject where, without an express grant of power, there is no authority to legislate at all. The provisions of section thirteen assume to do much more than

prescribe a mode of procedure. They assume to legislate upon the substantive right itself, and to prescribe conditions precedent to the right to vote. They do more than declare what evidence a citizen whose right is challenged shall produce; they assume to declare what he shall do before he can acquire the character of a voter. If its provisions are of any force at all they require that the citizen shall be a taxpayer, and, as such, recorded; that he shall not only reside in the State and county six months, but that he shall also swear that he intends to become a qualified elector; and they also require that a citizen, although he is otherwise as fully qualified as the Constitution requires, who has been temporarily absent, shall swear that he has not voted elsewhere. Elliott, Supp. § 1335. These requirements, every one of them, concern the substantive right, and add qualifications to those prescribed by the paramount law to which all legislation must yield. The supreme court of Oregon, in a strongly reasoned opinion, denies that registry can be considered a matter of procedure, and says: "The true view of this question seems to be that stated in *State v. Baker* (1875), 38 Wis. 86, that, where registry is required as a prerequisite to the right to vote, such registry is a condition precedent to the right itself." *White v. Commissioners* (1886), 13 Or. 322. In the course of the opinion it is said: "But under this act he who goes to the polls on election day possessing every constitutional qualification may find that the Legislature has stepped in between him and the Constitution. He finds his vote denied, because he has not done something which the Legislature has required him to do. He discovers that he is not a qualified elector, and yet he is told that his omission to do the act which had the effect to disqualify him is not a disqualification." The Court adopts as the law the statement of Mr. Drake, that "every definition of the qualification is but a statement of the terms on which the men may vote, and in every instance such definitions refer to what a party has done, as well as what he may do. They say to the voter: 'If you have done certain things you may vote.'" The thirteenth section of the act before us does say .

to the citizen what he must do in order to be entitled to vote, and in doing this it assumes to prescribe the terms upon which he may vote, thus stepping in between him and the Constitution and adding qualifications to those which that instrument requires. That the legislation embodied in section thirteen does assume to control the substantive right itself, and that this assumption of power is in direct and irreconcilable hostility to the Constitution, is a conclusion which seems to me to be beyond debate.

MITCHELL, J., (*dissenting*.) Those provisions of the Constitution which define the right of suffrage, and prescribe the qualifications of persons entitled to its exercise, and those statutes which look to the guarding of the purity of elections, and the integrity of the ballot box, demand the gravest and most deliberate consideration whenever they are drawn into judicial discussion. The right of the citizen who possesses the requisite qualifications to vote, is to be jealously protected, and any statute, the effect of which is to abridge, alter, or add to the constitutional qualification of the voter, or which imposes qualifications other than those prescribed by the Constitution, must necessarily fall under condemnation when subjected to a judicial test: *McCafferty v. Guyer* (1868), 59 Pa. 109. On the other hand, the fact must be kept constantly in view that the duty of prescribing rules and regulations for the orderly and honest exercise of the right of suffrage, and of providing reasonable safeguards for preserving the purity of elections, and for the prevention of frauds upon the ballot box, has been committed to the Legislature; and when the judiciary ventures to strike down a statute enacted by the immediate representatives of the people in response to a demand for purer elections, being without power to provide another in the place of the one destroyed, it should be able to rest its decision upon ground that is absolutely sure and impregnable. The purity of elections is subserved quite as effectually by the rigid exclusion of those who are not entitled to vote as by protecting the privilege of those who are. It has been said and re-

peated a thousand times that courts have no concern with the policy, convenience or expediency of a public law. These are questions solely for the Legislature. Any decision, therefore, which obliterates from the public law of the State a statute designed to prevent fraudulent voting, and to give effect to the ballots of honest voters, should rest broadly upon the safe ground that the statute blotted out by the Court is in clear violation of some express provision of the Constitution.

The test by which to determine the validity of every legislative enactment upon the subject of suffrage and elections is this: Does it add any substantive qualification or condition to those prescribed by the Constitution to the right of the voter to vote, or does it merely afford methods of proof by which to determine the presence or absence of the qualifications prescribed? If it falls within the class first described, it is unconstitutional and void; if within that last described, no matter what courts may think of its expediency, it is a valid exercise of legislative power, and is not subject to judicial interference. If the law is unwise or inexpedient, the Legislature is responsible, and it is for the people to apply the corrective, and not for the Court to substitute its judgment for that of the Legislature, or run a race of opinions upon points of reason and expediency with the law-making power. The courts all agree that the Legislature cannot prescribe conditions to the right to vote which shall add any substantive qualification to those prescribed by the Constitution, but it may prescribe modes of proof, such as test oaths, evidence of freeholders, or any other evidence which may be deemed efficient to disclose the presence or absence of the constitutional qualifications.

The Legislature cannot impair or abridge the right of suffrage in those who possess the constitutional qualifications; but it is clearly within the just and constitutional limits of legislative power to adopt any reasonable and uniform regulation affecting the mode of exercising the right, in such a manner as to facilitate pure, orderly and honest elections, and, to that end, to require the voter to furnish evidence of

his qualification by any provision of law not inconsistent with the right itself: *Capen v. Foster* (1832), 12 Pick. (Mass.) 488. Accordingly, it has been held that an elector may be required to furnish preliminary proof of his qualification to vote, and that this proof may be required either by a board of registration at a specified time before the election, or by an election board before receiving the vote of the elector: *In re McDonough* (1884), 105 Pa. 488.

The necessity [said the Supreme Court of Wisconsin] of preserving the purity of the ballot box is too obvious for comment, and the danger of its invasion too familiar to need suggestion. While, therefore, it is incompetent for the Legislature to add new qualifications for an elector, it is clearly within its province to require every person offering to vote to furnish such proof as it deems requisite that he is a qualified elector: *State v. Lean* (1859), 9 Wis. 279.

For example, an act of Congress, defining the qualifications of voters in territories subject to the jurisdiction of the United States, disfranchised bigamists, polygamists, and others living in prohibited marital relations. The Territorial Legislature of the Territory of Utah prescribed certain forms of proof which the voter was required to furnish in respect to his marital relations. This was recognized as a legitimate exercise of legislative power: *Murphy v. Ramsey* (1885), 114 U. S. 15. In like manner, where it was a constitutional condition to the right of suffrage that the voter had not been engaged in acts of open rebellion against the authority of the United States, it was held that a provision requiring the voter to take an oath as evidence or in proof of his loyalty, was a proper exercise of power: *Blair v. Ridgely* (1867), 41 Mo. 63.

The Constitution prescribes certain qualifications as conditions of the right to vote, but it is wholly silent as to the manner in which election boards or registration officers, if such shall be provided for, shall ascertain the presence or absence of the prescribed qualifications. The fact of sex, citizenship, age, domicile within the State, township, or voting precinct, are inquiries involved in the right of every person who claims the privilege of voting, and there can be no

doubt but that the Legislature must either have the power to prescribe modes of proof upon these subjects or the barriers against fraud and the prostitution of the elective franchise must be thrown down, so that elections, instead of reflecting the choice of honest voters, become a scramble between corrupt partisans to determine who shall excel in the pollution of the ballot box. The Legislature must have the power to provide by law the means of distinguishing the qualified from the unqualified voters, and this can only be done by providing a tribunal to decide, and by prescribing the means of obtaining evidence upon which a decision can be made. The tribunal which shall decide, and the evidence upon which the decision shall be made, are matters exclusively within legislative control.

Does the statute in question, when subjected to the tests proposed, add new and additional qualifications to the right to vote, or does it merely require the voter to furnish the evidence that he possesses the constitutional qualifications? Does it alter or abridge the right to vote, or does it do anything more than afford evidence by which to distinguish the true from the false voter? The constitutional qualifications relate to and affect the subjects of sex, citizenship, age, and domicile; and certain general limitations in respect to the subjects mentioned are imposed upon the right of suffrage. Other limitations than those mentioned cannot be imposed by legislative enactment; but, as has been seen, the Legislature has unlimited and plenary power over the subject of the methods of proving that the voter possessed the constitutional qualifications. It is pertinent to inquire to what extent, if at all, does the statute in question add new qualifications to the right to vote, or impose additional limitations than those above upon the exercise of the constitutional right?

The first substantive proposition contained in the statute is to the effect that any person who, having been a resident of the State, shall have absented himself therefrom for a period of six months or more, shall, at least three months before any election at which he intends to vote, register a

notice—the form of which is prescribed—of his intention to become a qualified voter, in the office of the clerk of the circuit court of the county in which he resides. There is a proviso which renders the notice inapplicable to any person who, six months or more before any election, shall have registered notice of his intention to hold his residence in this State during a contemplated absence. The statute provides that upon the demand of any challenger or member of the election board, any person thus absent may be required to produce a certified copy of the notice so required, to be registered before he shall be entitled to vote, which copy the clerk is required to furnish at the expense of the county. Having produced his certificate of registration, he shall then be entitled to vote, unless the challenger, or some other qualified voter of the precinct, shall make a written affidavit that he knows, or is informed and believes, giving the name of his informant, that the person offering to vote is not a legal voter, in which case the person so offering shall, in addition to his certificate of notice, and his own affidavit, produce the affidavit of a qualified person as to his right to vote. Like provision is made in regard to all persons who shall have gone into any other State or sovereignty with the intention of becoming voters there, or who have, during any absence from the State, voted in any other State or sovereignty; and also in regard to any person who shall not have been a *bona fide* resident of this State, and of the county in which he resides, at least six months prior to any election at which he offers to vote. It is as plain as any proposition can be that the provisions of the law relate exclusively to methods of proof by which to ascertain the constitutional qualification of voters, to distinguish between the true and the spurious. With the exceptions to be hereafter noted, they add no new conditions to the right of any person constitutionally qualified to vote, nor do they in the slightest degree impair, alter or abridge the right of any legal voter to cast his ballot. It is true, a legal voter, when properly challenged, may be required to furnish certain proof of his qualification; but until it can be said that the

Legislature can neither add to the constitutional qualifications of the voter nor require any proof of those prescribed, except such as may suit the notions of the judiciary, it is difficult to find any ground upon which to set aside and annul the statute. If the Court can obliterate a statute which requires one method of proof, then any and all other methods which the Legislature may devise are subject to judicial surveillance. If, as has been truly and forcibly said, the legislative department, being the nation or State itself, speaking by its representatives, has a choice of methods, and is the master of its own discretion, then upon what principle can the Court interfere and declare the particular method adopted of no effect? *State v. Haworth* (1889), 122 Ind. 462.

If the Court can say that a person who has absented himself from the State for six months or more, or one whose residence for six months or more prior to the election at which he intends to vote has been unfixed, and of an ambiguous character, cannot be required, upon being challenged at the polls, to furnish evidence that his intention was fixed, at least three months before election, to claim his residence in the precinct in which he offers to vote, then it can for the same reason adjudge that he shall not be required to prove, by the oath of a freeholder of the precinct, that he is a legal voter therein. If the requirement that he shall produce a certificate showing his intention a specified time previous to the election is adding a new qualification, then the requirement that he shall procure the oath of a freeholder is doing the same thing. The reasons which serve to annul one statute which prescribes a particular method of proof are equally potent to strike down any statute which prescribes methods of proof. The result will be that the Legislature must either tie the hands of election boards, and leave the ballot box open for the reception of honest and fraudulent votes alike, or it must feel its way blindly until it strikes a method of proof which shall pass judicial scrutiny. Requiring a person who offers to vote to produce a certificate when he is challenged, on the ground of nonresidence, showing

that he had declared his purpose to claim the right of suffrage before the heat, pressure, and excitement of election day, free from the solicitation of partisan friends, is not in any sense imposing an additional qualification, or abridging the right to vote, any more than requiring a voter to go to a specific place to vote, or to cast his ballot between specified hours on a given day, or to fold his ticket in a prescribed manner, or to prove by his own oath or the oaths of other parties his right to vote when challenged: *State v. Butts* (1884), 31 Kan. 537. As is pertinently said by BREWER, J., in the case last cited :

If the Legislature has the right to require proof of a man's qualification, it has a right to say when such proof shall be furnished, and before what tribunal; and, unless this power is abused, the courts cannot interfere.

It is no argument which a court can consider at all, to suggest that isolated instances may occur where a person absent from the State may be prevented, from sickness or other unavoidable cause, from registering the required certificate within the time prescribed; and it is equally impertinent to suggest that the nature of the employment of others may render it inconvenient, or even expensive, to return to the State, at or prior to a designated time, in order to record a declaration of their intention to vote. All laws designed for the prevention of great wrongs impose hardships occasionally on good men, while holding back the horde of evil doers, for whose restraint they were enacted. They are not, however, for that reason to be declared unconstitutional. It might, with equal reason, be urged that the law requiring electors to cast their ballots on a particular day, at a specified place, was unconstitutional because it omitted to make provision for those too sick to attend the polling place, or for those who are unavoidably absent from the State on election day. Nearly every law that has ever been passed requiring registration of some kind, to be completed a specified time before election day, has been assailed with these arguments; but in no case that has been followed as authority have these arguments proved availing: *State v. Butts*, *supra*, and

authorities cited; *Patterson v. Barlow* (1869), 60 Pa. 54; *People v. Hoffman* (1886), 116 Ill. 587.

Notwithstanding an isolated decision or two to the contrary, the authorities overwhelmingly sustain those provisions in election laws which require voters to afford the means for determining their qualifications prior to the haste and confusion of election day; and, while exceptional cases of inconvenience or hardship may arise, this is nothing more than may often result from the fact that the right to vote is fixed at a certain place, on a certain day, and between fixed hours. Hardship or inconvenience is no test of the constitutionality of a law. Besides, what objection can an honest voter make to a law that enables him, by his own act, to release himself of the unfounded aspersions which unfriendly partisans are always ready to cast upon him when, after a temporary absence from the State, he presents himself at the polls to vote? What better or more satisfactory evidence can there be of a residence complete and maintained than the personal appearance of the elector on the day of election, claiming his vote, with a certified copy of a declaration made before the dust and smoke of the campaign had arisen, showing that the question of residence was not an afterthought engendered by the heat and excitement of the campaign? Is not such a law as this promotive of honest voting? And does it not afford to an honest voter a safe and dignified method of establishing his residence without being compelled to deliver himself over to the ward politicians to be "put through" according to the devious methods which are sometimes practiced? Without question, a law like this will sometimes work a hardship to an honest man, but that is not the fault of the law. The fault lies in the conditions which require the enactment of such a law. Is it necessary, because an honest man may occasionally suffer wrong or inconvenience, to nullify the statute, with the sure consequence to follow that illegal voters and rogues shall have full swing to debauch the ballot box without let or hindrance? As was, in effect, said in *Patterson v. Barlow*, *supra*: What injustice is done to the real

electors by requiring all those without fixed residences, or who have maintained an ambiguous residence, to appear in person before some officer, and declare their residence at a specified time before election day? What clause of the Constitution forbids that a voter should be required to furnish evidence of his residence beforehand, rather than engage in a scramble for dubious evidence in the hurry and confusion of election day?

The Act is assailed because it is said the Constitution imposed upon the Legislature the duty of providing by a general law for the registration of all voters, and that inasmuch as this statute only requires certain persons whose residence is of an ambiguous character to register, it is therefore void. Whether a law is general or not, does not depend upon the number of persons who fall within its scope or operation. Laws are general, not because they operate upon every person in the State, but because every person who is brought within the relations and circumstances as provided for is affected by the laws: *Hancock v. Yaden* (1889), 121 Ind. 366-374. The statute under consideration affects no particular class of persons. It affects all alike who come within the relations and circumstances upon which it operates. The only fair assumption is that the law is aimed at persons who seek to vote illegally. Any other assumption is a reflection upon the Legislature that ought not to be made.

It is in some respects a misnomer to call the statute in question a registry law. While it is quite true the words "register" and "registration" are employed in the statute, its provisions bear little or no resemblance to a registry law. The Act simply provides for certain modes of proof in the cases of persons who offer to vote, upon the subjects of their residence. This proof is not required to be made to a board of registration, or before a registering officer, but to the election board. The evidence required is to consist of a written declaration or statement made by the elector, and filed with a public officer such a length of time before the election as to rebut any presumption that the pretense of residence is merely to secure the right to vote. The sole purpose of the

statute is to provide a method of proving residence, and not to secure a registry of voters of a particular class. The statute is to be judged, not by what it is called, but by its language, scope and purpose. But conceding it to be a law requiring a partial registration, by which is meant a registration which applies to all citizens under certain conditions or circumstances, while it has no application to others in a different situation, can the statute be maintained? The question is not a new one. It has been decided in the affirmative again and again by courts of the highest authority in the land. A constitution would indeed be "deformed and sterile" if a law designed to protect the ballot box in great centers of population from falsehood and fraud, should fall under condemnation because it did not also include the rural districts, where the necessity for such a law did not exist. Equally sterile and deformed would be a constitution under whose provisions a law could be justly condemned which required proof of a specified kind as to the qualification of all voters under a given state of circumstances, because it omitted to require the same kind of proof from all other persons, whether they came within or under the designated circumstances or not.

Let it be conceded that the Constitution requires the Legislature to provide for the registration of all voters in the State, how does it logically follow that it prohibits the enactment of a law which requires all voters under certain conditions, viz., those having for the time being no fixed residence, to register a notice of their intention to claim the right to vote in a particular voting precinct? Premise: It was the duty of the Legislature to enact a general registry law. This duty it has failed to perform. Conclusion: Having failed to perform this duty, the courts will declare any law that it may enact requiring voters when challenged on election day to furnish certain proof of their qualification to vote unconstitutional. This is the argument in substance. To say that because the Legislature omitted to perform a given duty, it is thereby prohibited from taking any step in the direction of the duty prescribed, is to violate all legal

precedents, as well as to go against all logical reasoning. The rule is that a body invested with a certain power may exercise the power with which it is invested to any degree not in excess of the whole. So when the chief executive, being invested with the whole pardoning power, paroled a prisoner on condition of good behavior, it was contended that he must exercise the whole power or none. It was held, however, that being invested with the whole power it was lawful for him to exercise it in any degree. Accordingly, too, it has been held in numerous cases where the enactment of laws providing for a uniform system of registration was required, that statutes requiring voters, in certain designated cities, or in cities of a certain class, to register within a specified time prior to any election was valid: *Patterson v. Barlow*, *supra*; *State v. Butts*, *supra*; *People v. Hoffman*, *supra*. These decisions recognize the principle that the purity of the ballot box must be protected from the local and particular frauds and evil practices which are known to exist, and which disfigure and destroy the freedom and fairness of elections. Any other interpretation of the Constitution must operate as an incentive to fraud, which the Legislature is without power to arrest. Laws designed to protect the ballot box must strike at the pernicious practices which are known to be employed in order to nullify the vote of the honest voter. A law blind to the vicious methods of the dishonest politician, applied alike to every voter, might prove a delusion and a snare. A registry law which made no different provision for the registration and proof of domicile of those having no fixed abode from that required of permanent residents would be an absurdity. To say that a law is to be so general that it must open the door for the very evils it was intended to guard against is to effectually tie the hands of the Legislature from enacting any law to preserve the purity of the ballot box: *Comm. v. McClelland* (1886), 83 Ky. 686.

In so far as the law seems to require a voter who moves from one county to another, to register a notice of his intention to vote in the county to which he removes, three

months before the election, it is in my opinion invalid: *Page v. Allen* (1868), 58 Pa. 338; *Comm. v. McClelland* (1886), 83 Ky. 686; *Attorney General v. Detroit, supra*. A voter who moves from one county to another sixty days before an election, is entitled to vote in the township in which he establishes his residence. This statute seems to require such a voter to register or give notice three months before the election of his intention to vote. This cannot be required. To the extent that the statute requires an elector who moves from one county to another to register more than sixty days before the election, it adds a new qualification. Nor can the statement be upheld wherein it undertakes to require of any voter, as a condition to his right to vote, that he should procure a certificate from the auditor of the county showing that his name had been continuously on the tax duplicate of the county for a given period. This last is a condition that might well imply a property qualification, and is in addition to those prescribed in the Constitution. As has been, in effect, said, a registry law which would require a longer residence prior to the time of voting than that required by the Constitution, or which should require the payment of taxes not required to be paid by constitutional provision, would be void: *McCrary, Elect.* § 8; *Kinneen v. Wells* (1887), 114 Mass. 497.

To the extent that the statute requires persons who have absented themselves from the State for a period of six months or more, or those who have gone into any other State or sovereignty with the intention of voting therein, or who have voted in any other State or sovereignty during any absence from this State, and also to the extent that it requires persons who have not been *bona fide* residents of the State at least six months before any election at which they offer to vote, to present the required certificate of their intention, it should be held constitutional and valid. To the extent that it requires persons who have lived in the State for six months, but who moved from one county to another, to present the proof prescribed, and to the extent that it requires proof that the voter has been borne on the tax duplicate, it is invalid.

[The Constitution of *Alabama* begins with "ARTICLE I. DECLARATION OF RIGHTS," declaring—"SEC. 32. That temporary absence from the State shall not cause a forfeiture of residence once obtained. SEC. 34. The right of suffrage shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult, or other improper conduct. SEC. 38. No educational or property qualification for suffrage or office, nor any restraint upon the same, on account of race, color, or previous condition of servitude, shall be made by law." Further on, ARTICLE VIII provides that—"SECTION 1. Every male citizen of the United States, and every male person of foreign birth, who may have legally declared his intention to become a citizen of the United States before he offers to vote, who is twenty-one years old, or upwards, possessing the following qualifications, shall be an elector, and shall be entitled to vote at any election by the people, except as hereinafter provided: *First*—He shall have resided in the State at least one year immediately preceding the election at which he offers to vote. *Second*—He shall have resided in the county for three months, and in the precinct or ward for thirty days immediately preceding the election at which he offers to vote; *Provided*, that the general assembly may prescribe a longer or shorter residence in any precinct in any county, or in any ward in any incorporated city or town, having a population of more than five thousand inhabitants, but in no case to exceed three months: *And Provided*, That no soldier,

sailor or marine, in the military or naval service of the United States, shall acquire a residence by being stationed in this State. SEC. 3. The following classes shall not be permitted to register, vote, or hold office: *First*—Those who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary. *Second*—Those who are idiots or insane. SEC. 5. The general assembly shall pass laws not inconsistent with this Constitution, to regulate and govern elections in this State, and all such laws shall be uniform throughout the State. The general assembly may, when necessary, provide by law for the registration of electors throughout the State, or in any incorporated city or town thereof, and when it is so provided, no person shall vote at any election unless he shall have registered as required by law."

[Under a somewhat similar though abbreviated provision in the Constitution of 1819, the State Supreme Court declared that the right of suffrage was a privilege not to be taken away by any or all departments of the government, though the citizen might waive or relinquish the privilege for a greater temporary advantage: and a law, giving a citizen the choice of serving as sheriff with a casting vote only, or not and voting generally, was declared constitutional: *The State v. Adams* (1829), 2 Stew. (Ala.) 231.

[In *Arizona*, as in *New Mexico*, *Utah*, *Idaho* and *Montana*, the Revised Statutes of the United States now provide that, after the first election in each Territory,—“SEC. 1860. At all subsequent elections,

however, in any Territory hereafter organized by Congress, as well as at all elections in Territories already organized, the qualifications of voters and of holding office shall be such as may be prescribed by the legislative assembly of each Territory; subject nevertheless to the following restrictions on the power of the legislative assembly, namely: *First.* The right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one years, and by those above that age who have declared on oath, before a competent court of record, their intention to become such, and have taken an oath to support the Constitution and Government of the United States. *Second.* There shall be no denial of the elective franchise or of holding office to a citizen on account of race, color, or previous condition of servitude. *Third.* No officer, soldier, seaman, mariner, or other person in the Army or Navy, or attached to troops in the service of the United States, shall be allowed to vote in any Territory, by reason of being on service therein, unless such Territory is, and has been for the period of six months, his permanent domicile. *Fourth.* No person belonging to the Army or Navy shall be entitled to or hold any civil office or appointment in any territory." By Act of Congress, approved March 22, 1882 (22 Stat. at Large 31), it was provided "SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this Section, in any Territory, or other place over which the United States have exclusive jurisdiction, shall

be entitled to vote at any election held in any such Territory, or other place, or be eligible for election or appointment to or be entitled to hold any office or place of trust, honor or emolument in, under, or for any such Territory or place, or under the United States." (See also special act relating to *Utah, infra.*) These requirements were enacted under the power conferred on Congress by Article IV of the Constitution,— "SECTION 3. * * The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States or of any particular State."

[Under the Territorial government of *Dakota*, the validity of a registration law was considered in *Farren v. Commissioners of Buffalo County* (1888), 5 Dak. 36. "In determining the * * question, we must recur to the organic act * * and see what power it confers upon the legislature of the territory in reference to fixing the qualifications of voters. We find, upon an examination of its provisions, that the power to prescribe the qualifications of voters is expressly conferred upon that body. Under the power thus conferred by the Congress of the United States, the legislature, after prescribing various qualifications for voters, says that in addition to such qualifications, all persons, who 'shall have complied with the provisions of any law which is now or may in the future be in force relating to the registration of voters, shall be entitled to vote.' The legislature

subsequently enacted a law 'relating to the registration of voters' * * This registration is made by the law * * a qualification which the elector must possess before he will be entitled to vote—not a mere regulation, as it is in some of the States having laws on this subject. But the voter has another means within his power to become qualified in case he has failed to comply with the registry law." The Court then refers to section eight of the Act of 1881, c. 122, giving power to furnish evidence by affidavit as to his being an inhabitant and the oath of a householder, although not on the register, and proceeds, "To be entitled to vote, one or other of these requirements must be met by the elector, and a failure to do so renders him disqualified to exercise the right of suffrage. If the law in this regard were intended as a mere regulation, instead of a qualification, the rule would not be so strict. But, in our opinion, it makes the requirements of this law just as essential to the qualification of a voter in this territory as the attainment of majority, or the time of residence in the territory or precinct. * * We are therefor of the opinion that the registry law * * is valid, and a compliance therewith constitutes a qualification of suffrage."

[The Constitution of *Arkansas*, in the Article (III) on Franchise and Elections, provides, "SECTION 1. Every male citizen of the United States, or male person who has declared his intention of becoming a citizen of the same, of the age of twenty-one years, who has resided in the State twelve months, and in the county six months, and in the voting precinct or ward one

month, next preceding any election, where he may propose to vote shall be entitled to vote at all elections by the people. SEC. 2. Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby the right to vote at any election shall be made to depend upon any previous registration of the elector's name; or whereby such right shall be impaired or forfeited, except for the commission of a felony at common law, upon lawful conviction thereof."

[In *California*, The Declaration of Rights in the First Article of the Constitution of 1879, provides—"SEC. 24. No property qualification shall ever be required for any person to vote or hold office." By the Second Article—"SECTION 1. Every native male citizen of the United States, every male person who shall have acquired the rights of citizenship under and by virtue of the treaty of Queretaro, and every male naturalized citizen thereof, who shall become such ninety days prior to any election, of the age of twenty-one years, who shall have been a resident of the State one year next preceding the election, and of the county in which he claims his vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law; *provided*, no native of China, no idiot, no insane person, or person convicted of an infamous crime, and no person hereafter convicted of embezzlement or misappropriation of public money, shall ever exercise the privileges of an elector in this State. SEC. 4. For the pur-

pose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student at any seminary of learning; nor while kept at any alms-house, or other asylum, at public expense; nor while confined in any public prison." Among the Miscellaneous Subjects in Article XX, is the provision, that—"SEC. 11. * * The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice."

[In *Webster v. Byrnes* (1867), 34 Cal. 273, the names of the voters were not on the poll list, and the Court held "Neither was entitled to vote. It is so expressly provided in the twenty-ninth section of the Registry Act." The Court in this case also held that the fact that the name was first entered on the poll list and then afterwards erased by the Board of Registration, made no difference, saying "His name was not on the poll list on the day of election, and therefore he was not entitled to vote. Under the twenty-fourth section, the Board of Registration, at their final meeting, commenced on the third day next preceding the election, are expressly required to revise the poll list and to erase the names of all persons not then actually residing in the district, or who are not qualified electors, or are not for any reason entitled to remain enrolled." To the same effect: *Preston v. Culbertson* (1881),

58 Cal. 198, 208. Both of these were contested election cases and the addition of a qualification was not contested.

[In *Colorado*, the Bill of Rights, in Article II of the Constitution, declares—"SEC. 5. That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." By Article VII—"SECTION 1. Every male person over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections: *First*.—He shall be a citizen of the United States or, not being a citizen of the United States, he shall have declared his intention according to law, to become such citizen, not less than four months before he offers to vote. *Second*.—He shall have resided in the State six months immediately preceding the election at which he offers to vote, and in the county, city, town, ward, or precinct, such time as may be prescribed by law: *Provided*, That no person shall be denied the right to vote at any school district election, nor to hold any school district office, on account of sex. SEC. 4. For the purpose of voting and eligibility to office, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while in the civil or military service of the State, or of the United States, nor while a student in any institution of learning, nor while kept at public expense in any poor house or other asylum, nor while confined in public prison. SEC. 11. The General Assembly shall pass laws to secure the purity of elections and guard against abuses of the

elective franchise."

[In *Connecticut*, the Constitution of 1818, as amended in 1845, and 1876, fixed the qualifications of electors thus—"SEC. 2. Every [white] male citizen of the United States who shall have attained the age of twenty-one years, who shall have resided in this State for a term of one year next preceding, and in the town in which he may offer himself to be admitted to the privileges of an elector, at least six months next preceding the time he may so offer himself, and shall sustain a good moral character, shall, on his taking such oath as may be prescribed by law, be an elector." By the Eleventh Amendment, adopted in October 1855, "Every person shall be able to read any Article of the Constitution, or any section of the statutes of this State, before being admitted an elector." The Sixth Article of the Constitution also directs that—"SECT. 5. The selectmen and town clerk of the several towns shall decide on the qualifications of electors, at such times and in such manner as may be prescribed by law. SECT. 6. Laws shall be made to support the privilege of free suffrage, prescribing the manner of regulating and conducting meeting of electors, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult and other improper conduct."

[In *Hyde v. Brush* (1867), 34 Conn. 454, it appeared that the plaintiff's name was upon the perfected registry list of the town and upon that used at the polls, but his right to vote was challenged, and he was referred by the defendant to the selectmen and the town clerk who determined he had no right to

vote. The Superior Court charged the jury in substance, that the perfected registry list of electors was conclusive, and consequently the right to challenge on the day of election did not exist, and the question then raised was whether this decision was correct. Chief Justice HINMAN said. "We think it was correct. The right of challenging illegal voters at the elector's meetings existed until the act of 1860, and there is no doubt that the moderator in this case acted in strict conformity to the previous law. But in 1860 the law in respect to the registration of voters at elector's meetings was revised. * * The Act is * * intended to provide for the making of a full and complete list of all persons having the right to vote at an approaching election, except only those who might become of age or be naturalized between the last meeting of the board and the day of election. The object was to prevent the interruption of the elector's meetings by any enquiry as to the right of voting beyond the inspection of the perfected list of electors. It is no doubt true that an elector may remove from the town between the last meeting of the board of registration and the day of the election, and so the statute, by making the registration conclusive as to the right, may authorize a person to vote who is not in fact a resident of the town on the very day of the election. * * But if it be assumed that this is an imperfection in the law, overlooked at the time of its enactment, it is still true, we think, that it was intended that the action of the board of registration should be final and conclusive upon all the cases acted upon by them at their last meeting previous to the

day of the election. The board of registration is the board to decide upon the qualification of persons to become electors, and they are acting in the capacity of judges in making the perfected list, as well as in the admission or rejection of new applicants for admission as electors."

[The Constitution of *Delaware*, in Article I reserves out of the general powers of government that—"SEC. 3. All elections shall be free and equal." Article IV, as amended January 30, 1855, provides that—"SECTION 1. All elections for governor, senators, representatives, sheriffs and coroners shall be held on the [second Tuesday of November] *on the Tuesday next after the first Monday in the month of November of the year*, and be by ballot; and in such elections every free white male citizen of the age of twenty-two years or upwards, having resided in the State one year next before the election, and the last month thereof in the county where he offers to vote, and having within two years next before the election, paid a county tax, which shall have been assessed at least six months before the election, shall enjoy the right of an elector; and every free white male citizen of the age of twenty-one years, and under the age of twenty-two years, having resided as aforesaid, shall be entitled to vote without payment of any tax: *Provided*, that no person in the military, naval, or marine service of the United States, shall be considered as acquiring a residence in this State, by being stationed in any garrison, barrack, or military or naval place or station within this State, and no idiot, or insane person, or pauper, or person convicted

of a crime deemed by law [a] felony, shall enjoy the right of an elector; and that the legislature may impose the forfeiture of the right of suffrage as a punishment for crime."

[The Fourteenth Article of the Constitution of *Florida* defines the eligibility of voters in—"SECTION 1. Every male person of the age of twenty-one years and upwards, of whatever race, color, nationality, or previous condition, who shall, at the time of offering to vote, be a citizen of the United States, or who shall have declared his intention to become such in conformity to the laws of the United States, and who shall have resided and had his habitation, domicile, home and place of permanent abode in Florida for one year, and in the county for six months next preceding the election at which he shall offer to vote, shall, in such county, be deemed a qualified elector at all elections under this Constitution. Every elector shall, at the time of his registration, take and subscribe to the following oath: I, ———, do solemnly swear that I will support, protect and defend the Constitution and government of the State of Florida, against all enemies, foreign or domestic; that I will bear true faith, loyalty and allegiance to the same, any ordinances or resolution of any State Convention or Legislature to the contrary notwithstanding. So help me God. SEC. 2. No person under guardianship, *non compos mentis*, or insane, shall be qualified to vote at any election; nor shall any person convicted of felony be qualified to vote at any election, unless restored to civil rights. SEC. 3. At any election at which a citizen or subject of any

foreign country shall offer to vote under the provisions of this Constitution, he shall present to the persons lawfully authorized to conduct and supervise such elections, a duly sealed and certified copy of his declaration of intention, otherwise he shall not be allowed to vote; and any naturalized citizen offering to vote, shall produce before said persons lawfully authorized to conduct and supervise the election, the certificate of naturalization, or a duly sealed and certified copy thereof; otherwise he shall not be permitted to vote.

SEC. 6. The Legislature, at its first session after the ratification of this Constitution, shall by law provide for the registration, by the Clerk of the Circuit Court in each county, of all the legally qualified voters in each county, and for the returns of elections; and shall also provide that after the completion, from time to time, of such registration, no person not duly registered according to law, shall be allowed to vote. SEC. 7. The Legislature shall enact laws requiring educational qualifications for electors after the year one thousand eight hundred and eighty, but no such laws shall be made applicable to any elector who may have registered or voted at any election previous thereto."

In *Georgia*, the Constitution of 1877 provides, in Art. II, § 1, Par. II. "Every male citizen of the United States (except as herein-after provided), twenty-one years of age, who shall have resided in this State one year next preceding the election, and shall have resided six months in the county in which he offers to vote, and shall have paid all taxes which may hereafter be required of him, and which he

may have had an opportunity of paying, agreeably to law, except for the year of the election, shall be deemed an elector: *Provided*, that no soldier, sailor or marine in the military or naval service of the United States, shall acquire the rights of an elector by reason of being stationed on duty in this State; and no person shall vote, who, if challenged, shall refuse to take the following oath, or affirmation: 'I do swear (or affirm) that I am twenty-one years of age, have resided in this State one year, and in this county six months, next preceding this election. I have paid all taxes which, since the adoption of the present Constitution of this State, have been required of me, previous to this year, and which I have had an opportunity to pay, and I have not voted at this election.' § 2, Par. I. The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of persons shall not be permitted to register, vote, or hold any office, or appointment of honor or trust in this State, to wit: 1st. Those who shall have been convicted, in any Court of competent jurisdiction, of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such person shall have been pardoned. 2d. Idiots and insane persons."

[Under the previous statute of August 7, 1872, amending the charter of the City of Savannah (Code of 1873, page 871), a registration for municipal elections was required by the clerk of the Com-

mon Council, during certain months, upon the personal application of an elector. (The present provisions are substantially similar: Code of 1882, page 1255). Certain citizens and tax payers asked for an injunction against the enforcement of this law], because (1) it added to the qualification required by the Constitution; (2) the tax of one dollar was required to be paid in lieu of poll tax; (3) an elector was required to take an oath before the clerk; and lastly (4) the clerk was required to publish a list of those registered and to furnish lists to the election boards. But the Supreme Court decided that these were not qualifications in addition to those prescribed by the Constitution. "These, in our opinion, are statutory regulations designed to secure the discharge of duties [which] citizens may owe the municipal government and to protect the purity of the ballot. * * * If it is not competent for the legislature to provide regulations for the conduct and management of municipal elections—beyond requiring the electors to be clothed with the constitutional qualifications—then there would be an end of all municipal government, for every qualified voter of the county could vote at the municipal election. If registration is a new qualification, as is contended for, so would residence in the corporate limits be, and each be violative of the Constitution. * * * Municipal corporations form an exception to the rule which forbids the legislature to delegate any of its powers to subordinate subdivisions. Restraints on the legislative power of control must be found in the Constitution of the State, or they must rest alone in the legisla-

tive discretion: *SPEER, J., McMahon v. The Mayor* (1880), 66 Ga. 217, 223-5.

[Under the Atlanta local option act and election law of 1885, the United States District Judge, MCCAY, thought a registration valid though there was no provision for adding the names of those who became competent to vote between the closing of the registration and the election, if the period was brief, or not grossly excessive, and proper for putting the registry into shape for use at the polls: *Weil v. Calhoun* (1885), U. S. Circ. Ct., N. D. Ga. 25 Fed. Repr. 865, 871. This question has recently obtained from the State Supreme Court, the more definite decision that, a period of two months was so unreasonable as to avoid a municipal election. "The true law is that whenever a registration is ordered, it should give the voters an opportunity as near the day of election as practicable, for qualifying themselves as electors. All the authorities concur in holding that, if the length of time between the closing of the registration and the election is unreasonable, the election should be held void. In the case of *State v. Butts* (1884), 31 Kan. 537, Judge BREWER held that for the registration to close ten days before the election was not an unreasonable time. His opinion is able and well considered, and we think, lays down the correct rule as to the reasonableness or unreasonableness of registration acts." *SIMMONS, J., Stephens v. The Mayor*, March 10, 1890, Sup. Ct. Ga.

[The Constitution of *Idaho* is not at hand, and will be mentioned in the *Legal Notes* of a succeeding number.

[In *Illinois*, the Bill of Rights in

the Second Article of the Constitution provides like Pennsylvania (*infra*) that—"SECTION 18. All elections shall be free and equal." And in Article VII, the qualifications of legal voters, are that—"SECTION 1. Every person having resided in this State one year, in the county ninety days, and in the election district thirty days next preceding any election therein, who was an elector in this State on the first day of April, in the year of our Lord 1848, or obtained a certificate of naturalization before any court of record in this State prior to the first day of January in the year of our Lord 1870, or who shall be a male citizen of the United States, above the age of twenty-one years, shall be entitled to vote at such election. SEC. 4. No elector shall be deemed to have lost his residence in this State by reason of his absence on business of the United States, of this State, or in the military or naval service of the United States. SEC. 5. No soldier, seaman or marine in the army or navy of the United States shall be deemed a resident of this State in consequence of being stationed therein. SEC. 7. The General Assembly shall pass laws excluding from the right of suffrage persons convicted of infamous crimes." In the Fourth Article, it is also provided that—"SECTION 22. The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for— * * * The opening and conducting of any election, or designating the place of voting: * * *"] Under these Constitutional provisions, a law for the registration of voters at city or town elections was passed in 1885. It was not deemed applicable to a

city or town until such city or town adopted it at an election held for that purpose. It required the courts for such cities or towns as adopted the law, to appoint an election board of three persons, one of whom should be of opposite politics from the other two; and required registration three weeks before the day of election, rejecting all proof tendered on that day. The entire Act was held valid. The Court declared the Act not to be local or special; and not to violate the clause of the Constitution declaring that all elections must be equal. MAGRUDER, J., in writing the opinion of the Court quoted from, *Patterson v. Barlow* (1869), 60 Pa. 54, that—"That election is free and equal where all of the qualified electors of the precinct are carefully distinguished from the unqualified, and are protected in the right to deposit their ballots in safety, and unprejudiced by fraud. That election is not free and equal where the true electors are not separated from the false—where the ballot is not deposited in safety, or where it is supplanted by fraud. It is therefore the duty of the legislature to secure freedom and equality by such regulations as will exclude the unqualified, and allow the qualified only to vote." The Illinois Court adds: "Where the law-making department of the government, in the exercise of a discretion not prohibited by the Constitution, has declared that a certain period of time is needed for a specified investigation, it is not the duty of this Court to declare, that such period is unreasonably long." Elsewhere it is said: "There must be some tribunal to decide, whether or not a person is a citizen of the United States over

twenty-one years of age, and has resided in the State one year, in the county ninety days, and in the district thirty days. There must be some fixed rules and regulations, by which such tribunal is to be guided, in determining this fact of citizenship and these periods of residence. There must be a statute, which shall designate the tribunal and prescribe the rules and regulations. The passage of such a statute is the legitimate province of the legislature alone. It being conceded, then, that the power to enact a law for the registration of voters is vested in the legislature, the only question for this Court to determine is, whether the particular enactment now under consideration, is such an arbitrary and unreasonable exercise of the power in question, as to amount to a violation of" the Constitution. The Court reached the conclusion that it was not: *People v. Hoffman* (1886), 116 Ill. 587; *Byler v. Asher* (1868), 47 Id. 101; *Davis v. School District in Haverhill* (1862), 44 N. H. 398; *U. S. v. Quinn* (1870), U. S. Cir. Ct. S. Dist. N. Y., 8 Blatchf. 48, 59.

In *Indiana*, before the present amendment of March 14, 1881, the Constitution provided—"ARTICLE II, SECTION 2. In all elections not otherwise provided for by this Constitution, every white male citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the State during the six months immediately preceding such election; and every white male of foreign birth, of the age of twenty-one years and upwards, who shall have resided in the United States one year, and shall have resided in this State during the six months immediately

preceding such election, and shall have declared his intention to become a citizen of the United States, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote in the township or precinct where he may reside." [It will be observed that the amendment struck out the word "white," and inserted after each use of the words "six months" these words—"and in the township sixty days, and in the ward or precinct thirty days."] The Legislature passed a registration law, requiring a twenty days' registration in the township where the voter resided; and this was held void, because it required a qualification in the voter not required by the Constitution: *Quinn v. State* (1871), 35 Ind. 485. A similar decision was rendered in North Carolina, upon a statute requiring ninety days' residence when the Constitution required only thirty: *People v. Canaday* (1875), 73 N. C. 198. Similarly, *State v. Williams* (1856), 5 Wis. 308; *People v. Teague*, decided by the Supreme Court of North Carolina, May 19, 1890.

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twenty-one years of age, and has resided in the State one year, in the county ninety days, and in the district thirty days. There must be some fixed rules and regulations, by which such tribunal is to be guided, in determining this fact of citizenship and these periods of residence. There must be a statute, which shall designate the tribunal and prescribe the rules and regulations. The passage of such a statute is the legitimate province of the legislature alone. It being conceded, then, that the power to enact a law for the registration of voters is vested in the legislature, the only question for this Court to determine is, whether the particular enactment now under consideration, is such an arbitrary and unreasonable exercise of the power in question, as to amount to a violation of" the Constitution. The Court reached the conclusion that it was not: *People v. Hoffman* (1886), 116 Ill. 587; *Byler v. Asher* (1868), 47 Id. 101; *Davis v. School District in Haverhill* (1862), 44 N. H. 398; *U. S. v. Quinn* (1870), U. S. Cir. Ct. S. Dist. N. Y., 8 Blatchf. 48, 59.

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preceding such election, and shall have declared his intention to become a citizen of the United States, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote in the township or precinct where he may reside." [It will be observed that the amendment struck out the word "white," and inserted after each use of the words "six months" these words—"and in the township sixty days, and in the ward or precinct thirty days."] The Legislature passed a registration law, requiring a twenty days' registration in the township where the voter resided; and this was held void, because it required a qualification in the voter not required by the Constitution: *Quinn v. State* (1871), 35 Ind. 485. A similar decision was rendered in North Carolina, upon a statute requiring ninety days' residence when the Constitution required only thirty: *People v. Canaday* (1875), 73 N. C. 198. Similarly, *State v. Williams* (1856), 5 Wis. 308; *People v. Teague*, decided by the Supreme Court of North Carolina, May 19, 1890.

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been, for sixty days next preceding the election, a resident of the precinct in which he offers to vote, and he shall vote in said precinct, and not elsewhere." The marginal note in the General Statutes of 1887, declares the section just quoted to relate to qualifications of electors of Representatives in the Legislature, and the following section those of State Senators—"SEC. 15. One Senator for each district shall be elected by the qualified voters therein, who shall vote in the precincts where they reside, at the places where elections are by law directed to be held." In the Third Article, *Concerning the Executive Department*, it is provided that—"SEC. 2. The Governor shall be elected for the term of four years, by the qualified voters of the State, at the time when and places where they shall respectively vote for Representatives. * * * " And there is no definition of a qualified voter. Amongst the *General Provisions* of the Eighth Article is—"SEC. 4. Laws shall be made to exclude from office and from suffrage, those who shall thereafter be convicted of bribery, perjury, forgery, or other crimes, or high misdemeanors. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practices." And this usual provision—"SEC. 15. Absence on the business of this State or the United States, shall not forfeit a residence once obtained, so as to deprive anyone of the right of suffrage, or of being elected or appointed to any office under this Commonwealth under the exceptions contained in this

Constitution." Other unusual provisions are—"SEC. 15. In all elections by the people, and also by the Senate and House of Representatives, jointly or severally, the votes shall be personally and publicly given, *viva voce*: *Provided*, That dumb persons entitled to suffrage may vote by ballot. SEC. 16. All elections by the people shall be held between the hours of six o'clock in the morning and seven o'clock in the evening." Amongst some unusual provisions in the *Bill of Rights* (Art. XIII) is—"SEC. 7. That all elections shall be free and equal."

[In *Commonwealth v. McClelland* (1886), 83 Ky. 686, the question "whether the General Assembly has the power to enact any law requiring qualified voters to be registered before the day of election, as a condition of the exercise of their right of suffrage, and if so, whether such law is valid when made local and not general in its application," came up before the Court. Judge LEWIS in delivering the opinion said: "The right to vote is conferred and the qualifications of voters subject to the modifications made by [Amend.] XV of the Constitution of the United States, are prescribed by section 8, Article II, of the State Constitution. * * * The actual exercise of the right to vote by those possessing the constitutional qualifications is made to depend upon needful rules and regulations which the General Assembly may, from time to time, provide by law, and which section 4, Article VIII of the Constitution makes its duty to provide. * * It is true that until the passage of the act in question, there never was in this State any law, general or local in its application,

requiring an examination at any other time or place or by any other officers than on the day of election, at the place of voting, and by those conducting the election, but the nonexercise of the power proves nothing more than that the exigency requiring a registration of qualified voters before the day of election has not, in the opinion of the Legislature, heretofore existed." And after quoting the language of Cooley in his work on Constitutional Limitations, page 602, he proceeds, "If, as we think is beyond question, the Legislature may without infringing the constitutional privilege of suffrage, enact a general registration law, the only way to avoid the conclusion that it may also, in its discretion, enact such a law, local in its operation, is to make it appear that some provision of the Constitution or some right of the qualified voter would be violated in the latter case and not in the former; for the end sought in each case, is the support of the privilege of free suffrage, which involves the rigid and certain exclusion of those not entitled to vote, as well as the protection of those in the exercise of the privilege who are; and it is not simply a question of power, but is made the duty of the Legislature to adopt such regulations, whether general or local, as may be necessary to attain that end in each and every part of the State. * * In our opinion we are not authorized to hold a registration law invalid upon the sole ground that it is local in its application; and this view seems to be in accordance with the current of authority in this country."

[The Constitution of *Louisiana*, adopted July 23, 1879, forbids the general assembly (in Article 46,) passing any local or special law—

"For the opening or conducting of elections, or fixing or changing the place of voting." By "ART. 148. No person shall hold any office, State, parochial or municipal, or shall be permitted to vote at any election, or act as a juror, who, in due course of law, shall have been convicted of treason, perjury, forgery, bribery or other crime, punishable by imprisonment in the penitentiary, or who shall be under interdiction." These restrictions are repeated in "ART. 187. The following persons shall not be permitted to register, vote, or hold any office or appointment of honor, profit, or trust in this State, to wit: those who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, illegal voting or other crime punishable by hard labor or imprisonment in the penitentiary, idiots and insane persons." The qualifications of a voter are prescribed in "ART. 185. Every male citizen of the United States, and every male citizen of foreign birth, who has been naturalized or who may have legally declared his intention to become a citizen of the United States before he offers to vote, who is twenty-one years old or upwards, possessing the following qualifications, shall be an elector and shall be entitled to vote at any election by the people, except as hereinafter provided: 1. He shall be an actual resident of the State at least one year next preceding the election at which he offers to vote. 2. He shall be an actual resident of the parish in which he offers to vote at least six months next preceding the election. 3. He shall be an actual resident of the ward or precinct in

which he offers to vote, at least thirty days preceding the election. ART. 186. The general assembly shall provide by law for the proper enforcement of the provisions of the foregoing article: *provided*, that in the parish of Orleans, there shall be a supervisor of registration, who shall be appointed by the governor, by and with the advice and consent of the senate, whose term of office shall be for the period of four years, and whose salary, qualifications and duties shall be prescribed by law. And the general assembly may provide for the registration of voters in other parishes. ART. 188. No qualification of any kind, for suffrage or office, nor any restraint upon the same, on account of race, color, or previous condition shall be made by law. ART. 193. For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service, either civil or military, of this State, or of the United States; nor while engaged in the navigation of the waters of the State or of the United States, or of the high seas, nor while a student at any institution of learning."

[The case of *Auld v. Walton* (1857), 12 La. Ann. 129, held that the certificate of registry was full proof of the right to vote, and that no person could vote in New Orleans who was not the bearer of the same. The case was decided under the Act of March 20, 1856, enacted under the Constitution of 1852 which provided, "ART. 11. The legislature shall provide by law that the names and residences of all qualified electors of the city of New Orleans shall be registered, in order

to entitle them to vote; but the registry shall be free of cost to the elector." This provision is now replaced by Article 186 of the present Constitution.

[In *Maine*, the qualifications of electors are fixed by Article II—"SEC. 1. Every male citizen of the United States of the age of twenty-one years and upwards, excepting paupers, persons under guardianship, and Indians not taxed, having his residence established in this State for the term of three months next preceding any election, shall be an elector for Governor, Senators, Representatives, in the town or plantation, where his residence is so established; and the elections shall be by written ballot. But persons in the military, naval or marine service of the United States, or this State, shall not be considered as having obtained such established residence, by being stationed in any garrison, barrack, or military place, in any town or plantation; nor shall the residence of a student at any seminary of learning entitle him to the right of suffrage in the town or plantation where such seminary is established. No person, however, shall be deemed to have lost his residence by reason of his absence from the State in the military service of the United States, or of this State." The fourth section has a lengthy provision for soldiers voting for Governor, Senators and Representatives; and the twelfth section of the Ninth Article, for county officers.

[The *Maryland* Constitution (ratified by the people, September 18, 1867,) regulates the elective franchise in its First Article—"SECTION 1. All elections shall be by ballot; and every [white]

male citizen of the United States, of the age of twenty-one years, or upwards, who has been a resident of the State for one year, and of the Legislative District of Baltimore City, or of the county, in which he may offer to vote, for six months next preceding the election, shall be entitled to vote, in the ward or election district, in which he resides, at all elections hereafter to be held in this State; and in case any county, or city, shall be so divided as to form portions of different electoral districts, for the election of Representatives in Congress, Senators, Delegates, or other officers, then, to entitle a person to vote for such officer, he must have been a resident of that part of the county, or city, which shall form a part of the electoral district, in which he offers to vote, for six months preceding the election; but a person, who shall have acquired a residence in such county or city, entitling him to vote at such election, shall be entitled to vote in the election district from which he removed, until he shall have acquired a residence in the part of the county or city to which he has removed. SEC. 2. No person above the age of twenty-one years, convicted of larceny or other infamous crime, unless pardoned by the Governor, shall ever thereafter be entitled to vote at any election in this State; and no person under guardianship, as a lunatic, or as a person *non compos mentis*, shall be entitled to vote. SEC. 3. If any person shall give, or offer to give, directly or indirectly, any bribe, present or reward, or any promise, or any security for the payment, or the delivery of money, or any other thing, to induce any voter to re-

frain from casting his vote, or to prevent him in any way from voting, or to procure a vote for any candidate, or person proposed, or voted for, as Elector of President and Vice-President of the United States, or Representative in Congress, or for any office of profit or trust, created by the Constitution or Laws of this State, or by the Ordinances, or Authority of the Mayor and City Council of Baltimore, the person giving, or offering to give, and the person receiving the same, and any person who gives, or causes to be given, an illegal vote, knowing it to be such, at any election to be hereafter held in this State, shall on conviction in a Court of Law, in addition to the penalties now or hereafter to be imposed by Law, be forever disqualified to hold any office of profit or trust, or to vote at any election thereafter. SEC. 5. The General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of election, of the right of every person thus registered to vote at any election thereafter held in this State; but no person shall vote at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless his name appears in the list of registered voters; and until the General Assembly shall hereafter pass an Act for the Registration of the names of voters, the Law in force on the first day of June, in the year eighteen hundred and sixty-seven, in reference thereto, shall be continued in force,

except so far as it may be inconsistent with the provisions of this Constitution; and the registry of voters, made in pursuance thereof, may be corrected, as provided in said Law; but the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of the Article, and who are not disqualified under the provisions of the second and third sections thereof."

[In the Third Article of the State Constitution of Maryland there is also a command that—"SEC. 42. The General Assembly shall pass Laws necessary for the preservation of the purity of elections."

[In *Smith v. Stephan et als.* (1887), 66 Md. 381, it was averred that the election, a municipal one, was void because it was carried on and conducted without, and in the absence of, and without regard to, any registry or list of qualified voters, and it was contended that the fifth section of Article I of the Constitution governed such elections, and that no one should be permitted to vote whose name did not appear on such list. The Court in its opinion says, "The section of the Constitution denies the right to vote at Federal and State elections, and municipal elections in the City of Baltimore, to all persons whose names do not appear in the list of registered voters. It makes no allusion to municipal elections in any other town or city. This distinction is clearly made in the Constitution between Federal and State elections on one side, and municipal elections on the other. It is impossible to mistake the meaning of the terms employed. An election

held for the purpose of regulating the local affairs of a town or city under the provisions of its charter would never be mistaken for a State election. * * The qualification to vote was required to exist before a person had the right to be registered; the registration consisted in making a list of those who were already duly qualified; and it was made for the purpose of being used only at State and Federal elections, and municipal elections in the City of Baltimore. The right of an inhabitant of Westminster, therefore, to vote for Mayor and Councilmen must depend on the requirements of the Constitution, without reference to the registration list."

[In *Anderson v. Baker et al.* (1865), 22 Md. 531, WEISEL, J., in passing upon the registration act of 1865, ch. 174, and the right of a voter applying to be registered, to decline to take the oaths prescribed by such act, upon the ground that these provisions, both of the law and of the Constitution, were contrary to, and in conflict with the provisions of section ten of the First Article of the Constitution of the United States, and repugnant to certain Articles of the Bill of Rights, said, in his concurring opinion, "The right to vote—the question of qualification or disqualification of the person offering to vote—is to be decided by the tribunals established by the law for the ascertainment of the necessary facts that enter into the inquiry. Means are appointed and judges provided to determine the question. * * This power and trust must be reposed somewhere; and in this State, and in all the States of the Union, it has been committed to judges of election, who are *quasi*

judicial officers, clothed with the powers and discretion necessary for the performance of the duty. * * The registration of voters is but another mode for attaining the same end, introduced into the government of some of the States, and now authorized in Maryland. It has the advantage of ascertaining before election, who are qualified to vote at the elections when they arrive. * * I do not regard these provisions of the Constitution of this State, or of the Act of Registration as obnoxious to the charge of being in conflict with the Constitution of the United States, or the Bill of Rights of Maryland." The opinion of the Court was delivered by BOWIE, C. J., who said "As far * * as the registration law is a legislative enactment of the first, second, third, fourth and fifth sections of Article One of the Constitution, it is not restrained by the Declaration of Rights, because it proceeds from the same authority, that of the Convention."

As early as 1832 registration laws were upheld in *Massachusetts*. [At that time an amendment to the Constitution of 1780, provided— "ART. III. Every male citizen of twenty-one years of age and upwards (except paupers and persons under guardianship), who shall have resided within the Commonwealth one year, and within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant-governor, senators, or representatives, and who shall have paid, by himself or his parent, master or guardian, any State or county tax which shall, within two years next preceding such election, have been assessed

upon him in any town or district of this Commonwealth, and also every citizen, who shall be by law exempted from taxation, and who shall be in all other respects qualified as above mentioned, shall have the right to vote in such election of governor, lieutenant-governor, senators and representatives, and no other person shall be entitled to vote in such elections:" ratified by the people, April 9, 1822, and still in force.

The legislature passed a law, requiring a registration, and provided for its publication. Unless registered, an elector could not vote: Statute of February 23, 1822, Chap. 110, § 24, ed. 1823, page 598. This statute was assailed as unconstitutional. In passing upon its validity, SHAW, C. J., *Capen v. Foster* (1832), 12 Pick. (Mass.) 485, said: "This Court is of opinion, that in all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and uniform regulations in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt, orderly and convenient manner. Such a construction would afford no warrant for such an exercise of legislative power, as, under the pretence and color of regulating, should subvert or injuriously restrain the right itself:" page 489.

The Court then points out that the Constitution does not define whether the election shall be by ballot or *viva voce*, in person or by proxy, and adds that a statute re-

quiring an elector to present a written ballot in person is no doubt valid ; on the ground that it " is a just exercise of legislative power, providing an easy and reasonable mode of exercising the constitutional right, and one calculated to prevent error and fraud, to secure order and regularity in the conduct of elections, and thereby give more security to the right itself:" page 490.

"The right of any individual person, claiming the privilege of voting, may involve an inquiry into the fact of citizenship, sex, age, domicile within the Commonwealth, domicile within the town or district, the payment of taxes, exemption by law from the payment of taxes, and the fact of his being a pauper or under guardianship or otherwise. * * * Is there anything in the above recited provision of the Constitution,

ich requires the selectmen to go through this investigation, during the progress of the polling, and whilst many other citizens, whose right is unquestioned, and proved by their names being previously entered on the list, are waiting to give in their ballots and retire? There is no express requirement, and we think there is no implication, arising either from the terms of the Constitution, or from the nature and purposes of the right of voting, which requires the selectmen to perform this duty, whilst in the actual performance of other positive duties, required by the express direction of the Constitution, and in the careful, exact and prompt performance of which the public, the whole body of qualified voters, have a deep interest:" pages 491-2.

[This language of SHAW, C. J., is

quoted and relied upon by the Court in *Kinneen v. Wells* (1887), 144 Mass. 497, which was an action of tort against the registrars of voters, to recover damages for wrongfully refusing to register the plaintiff as a voter. The real point in that case was upon the constitutionality of the statute of 1885, which provided "SECTION 7. No person hereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization." (Laws of 1885, ch. 345, page 802.) This law, the Court held to be in conflict with the Constitution of the Commonwealth, and therefore void. It was formally repealed by the Statute of 1887, ch. 329.

[The Massachusetts Constitution of 1780 also contained in the Declaration of Rights—"ART. IX. All elections ought to be free; and all inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." This word *inhabitants* means *citizens*: *Opinion of the Justices* (1877) 122 Mass. 595, 596.

[In 1857, the following amendment was added to the above provision of the Constitution of Massachusetts:—"ART. XX. No person shall have the right to vote, or be eligible to office under the Constitution of this Commonwealth, who shall not be able to read the Constitution in the English language, and write his name: *provided, however*, that the provisions of this Amendment shall not apply to any person prevented by a physical disability from complying with its requisitions, nor to any person who now has the right to

vote, nor to any person who shall be sixty years of age, or upwards, at the time this Amendment shall take effect." In 1881, another Amendment was added—"ART. XXVIII. No person, having served in the army or navy of the United States in time of war, and having been honorably discharged from such service, if otherwise qualified to vote, shall be disqualified therefor on account of being a pauper; or if a pauper, because of the non-payment of a poll tax."

[The Constitution of *Michigan* declares in the Seventh Article, that—"SECTION 1. In all elections, every male citizen, every male inhabitant residing in the State on the twenty-fourth day of June, one thousand eight hundred and thirty-five; every male inhabitant residing in the State on the first day of January, one thousand eight hundred and fifty, who has declared his intention to become a citizen of the United States, pursuant to the laws thereof, six months preceding an election, or who has resided in the State two years and six months, and declared his intention as aforesaid, and every civilized male inhabitant of Indian descent, a native of the United States, and not a member of any tribe, shall be an elector, and entitled to vote; but no citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he shall be above the age of twenty-one years, and has resided in this State three months, and in the township or ward in which he offers to vote, ten days next preceding such election: *Provided*, that in time of war, insurrection or rebellion, no qualified elector in the actual military service of the United States, or of this State, in the army or navy

thereof, shall be deprived of his vote by reason of his absence from the township, ward or State in which he resides; and the legislature shall have the power and shall provide the manner in which, and the time and place at which such absent electors may vote, and for the canvass and return of their votes to the township or ward election district, in which they respectively reside, or otherwise. SEC. 5. No elector shall be deemed to have gained or lost a residence, by reason of his being employed in the service of the United States, or of this State; nor while engaged in the navigation of the waters of this State or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse or other asylum at public expense; nor while confined in any public prison. SEC. 6. Laws shall be passed to preserve the purity of elections, and guard against abuses of the elective franchise. SEC. 7. No soldier, seaman, nor marine in the army or navy of the United States, shall be deemed a resident of this State, in consequence of being stationed in any military or naval place in this State. SEC. 8. Any inhabitant who may hereafter be engaged in a duel, either as principal or accessory before the fact, shall be disqualified from holding any office under the Constitution and laws of this State, and shall not be permitted to vote at any election."

[In *People ex rel. Foley v. Koplekom* (1868), 16 Mich. 342, it appeared that there had never been any valid or complete registration of voters or any legal board of registration in the township of Franklin since the organization of

1864, and that at the general election of 1866 a large number of electors voted without being registered. Here the Court said, "The statute in question is grounded upon the same article of the Constitution which gives the right to vote, and its object, as expressly declared in the title is, '*further to preserve the purity of elections, and guard against the abuses of the elective franchise, by a registration of electors.*' * * It contemplates general obedience, and continuous administration, and nowhere, in terms, makes any provision for its own nullification, either through violence, or the negligent or wilful failure of officers to organize or preserve boards. It does not speak the language of a mere offer, or proposition to the electors, to register or not, but utters the language of law, *unconditional, absolute, imperative*; and declares, *that all who do not register shall not vote.*" The votes were declared void.

[The Seventh Article of the Constitution of *Minnesota*, as amended November 3, 1868, declares that—
"SECTION 1. Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the United States one year, and in this State for four months next preceding any election, shall be entitled to vote at such election, in the election district of which he shall, at the time, have been for ten days resident, for all officers that now are, or hereafter may be elective by the people. *First.* Citizens of the United States. *Second.* Persons of foreign birth, who shall have declared their intention to become citizens, conformably to the laws of the United States upon the subject of naturali-

zation. *Third.* Persons of mixed white and Indian blood, who have adopted the customs and habits of civilization. *Fourth.* Persons of Indian blood residing in this State, who have adopted the language, customs and habits of civilization, after an examination before any district court of the State, in such manner as may be provided by law, and shall have been pronounced by said court capable of enjoying the rights of citizenship within the State. SEC. 2. No person not belonging to one of the classes specified in the preceding section, no person who has been convicted of treason or any felony, unless restored to civil rights, and no person under guardianship or who may be *non compos mentis*, or insane, shall be entitled or permitted to vote at any election in this State. SEC. 3. For the purpose of voting, no person shall be deemed to have lost a residence by reason of his absence while in the service of the United States; nor while engaged upon the waters of this State or of the United States; nor while a student of any seminary of learning; nor while kept at any alms-house or asylum; nor while confined in any public prison. SEC. 4. No soldier, seaman or marine in the army or navy of the United States, shall be deemed a resident of this State, in consequence of being stationed within the same."

[The present Constitution of *Mississippi* (soon to be abrogated) declares in the Bill of Rights (Art. I) that—"SEC. 18. No property or educational qualification shall ever be required for any person to become an elector. ART. VII. SEC. 2. All male inhabitants of this State, except idiots and insane persons, and Indians not taxed, citi-

sens of the United States, or naturalized, twenty-one years old and upwards, who have resided in this State six months, and in the county one month next preceding the day of election, at which said inhabitant offers to vote, and who are duly registered according to the requirements of section three of this article, and who are not disqualified by reason of any crime, are declared to be qualified electors. SEC. 3. The legislature shall provide, by law, for the registration of all persons entitled to vote at any election, and all persons entitled to register, shall take and subscribe to the following oath or affirmation: 'I, —, do solemnly swear (or affirm), in the presence of Almighty God, that I am twenty-one years old; that I have resided in this State six months and in — county one month; that I will faithfully support and obey the Constitution and laws of the United States, and of the State of Mississippi, and will bear true faith and allegiance to the same, so help me God.'" In *Hawkins et al. v. Carroll Co.* (1874), 50 Miss. 761, the Court said, "The second section [of the Constitution] declares the qualification of voters, their requisite sex, age, residence in the county and state, registration, and citizenship of the United States. The right of those having the other qualifications to vote is completed and evidenced by registration." In the same Article, it is provided that—"SEC. 6. In time of war, insurrection or rebellion, the right to vote at such place, and in such manner as shall be prescribed by law, shall be enjoyed by all persons otherwise entitled thereto, who may be in the actual military or naval service of the United States

or this State: *provided*, said votes be made to apply in the county or precinct wherein they reside."

[The Constitution of *Missouri*, adopted in 1865, provided, "ARTICLE II, SEC. 4. The general assembly shall immediately provide by law for a complete and uniform registration, by election districts, of the names of qualified voters in this State; which registration shall be evidence of the qualification of all registered voters to vote at any election thereafter held; but no person shall be excluded from voting at any election, on account of not being registered, until the general assembly shall have passed an act of registration, and the same shall have been carried into effect; after which no person shall vote unless his name shall have been registered at least ten days before the day of election; and the fact of such registration shall be no otherwise shown than by the register, or an authentic copy thereof, certified to by the judges of election, by the registering officer, or other constituted authority. A new registration shall be made within sixty days next preceding the tenth day prior to every biennial general election; and after it shall be made, no person shall establish his right to vote by the fact of his name appearing on any previous register." By the Amendment adopted November 3, 1874, these provisions were condensed to this simple sentence: "The general assembly shall provide by law for registering all voters in cities and towns having a population of more than ten thousand." This was changed in the present Constitution, ratified by the people, October 30, 1875, so as to read—"ARTICLE VIII. SEC. 5.

The General Assembly shall provide by law, for the registration of all voters in cities and counties having a population of more than one hundred thousand inhabitants, and may provide for such registration in cities having a population exceeding twenty-five thousand inhabitants, and not exceeding one hundred thousand, but not otherwise."

[It was held that a law allowing the board of registration up to five, instead of ten days before the election, within which to complete the books of registration, was not in conflict with these provisions, unless the "completion of the books" be held to authorize a continued registration of voters down to within five days of the election, and unless it appeared that persons cast their votes within the ten days, which the Court considered was not meant: *Ensworth v. Albin* (1870), 46 Mo. 450.

[The Bill of Rights (Art. II) also contains the usual declaration (§ 9) for free elections, in precisely the same words used in Colorado, *supra*, page 875. In the Fourth Article, "SEC. 53. The General Assembly shall not pass any local or special law: * * For the opening and conducting of elections, or fixing or changing the places of voting." By the Eighth Article—"SEC. 2. Every male citizen of the United States, and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people: *First*, He shall have

resided in the State one year immediately preceding the election at which he offers to vote. *Second*. He shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election. SEC.

3. All elections by the people shall be by ballot; every ballot shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the voter who presents the ballot. The election officers shall be sworn or affirmed not to disclose how any voter shall have voted, unless required to do so as witnesses in a judicial proceeding: *Provided*, That in all cases of contested elections, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law.

SEC. 5. [*supra*]. SEC. 7. For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence while employed in the service, either civil or military, of this State, or of the United States, nor while engaged in the navigation of the waters of the State or of the United States, or of the high seas, nor while a student of any institution of learning, nor while kept in a poor-house or other asylum at public expense, nor while confined in public prison. SEC. 8. No person, while kept at any poor-house or other asylum at public expense, nor while confined in any public prison, shall be entitled to vote at any election under the laws of this State. SEC. 10. The General Assembly may enact laws excluding from the right of voting, all per-

sons convicted of felony or other infamous crime, or misdemeanors connected with the exercise of the right of suffrage. SEC. 11. No officer, soldier or marine in the regular army or navy of the United States, shall be entitled to vote at any election in this State."

[A subsequent Act of 1883, "for the registration of all voters in cities having a population of more than one hundred thousand inhabitants, and to govern elections in such cities," was sustained under the provisions of the Constitution of 1875, against a contention of being a local and special law forbidden by Section Fifty-three of Article Four of the same Constitution, because the exercise of such power was expressly commanded, and the act applied not only to existing but to all future cities of the designated population: *Ewing v. Hoblitzelle* (1884), 85 Mo. 64, reversing S. C. 15 Mo. App. 441.

[The Constitution of *Montana* declares, in the Bill of Rights (Art. III) the freedom of elections, (§ 5) in precisely the same words used in Colorado, *supra*, page 875. The passage of local or special laws for "the opening or conducting any election, or designating the place of voting," is forbidden to the legislature, by Art. V, section twenty-six; while the right of suffrage is defined in the Ninth Article thus—"SEC. 2. Every male person of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all general elections and for all officers that now are, or hereafter may be, elective by the people, and upon all questions which may be submitted to the vote of the people: *First*, he shall be a citizen of the United States; *second*, he

shall have resided in this State one year immediately preceding the election at which he offers to vote, and in the town, county or precinct such time as may be prescribed by law; *Provided*, first, that no person convicted of felony shall have the right to vote unless he has been pardoned; *Provided*, second, that nothing herein contained shall be construed to deprive any person of the right to vote who had such right at the time of the adoption of this Constitution; *Provided*, that after the expiration of five years from the time of the adoption of this Constitution, no persons except citizens of the United States shall have the right to vote. SEC. 3. For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence while employed in the service of the State, or of the United States, nor while a student at any institution of learning, nor while kept at any almshouse or other asylum at the public expense, nor while confined in any public prison. SEC. 6. No soldier, seaman or marine, in the army or navy of the United States, shall be deemed a resident of this State, in consequence of being stationed at any military or naval place within the same. SEC. 8. No idiot or insane person shall be entitled to vote at any election in this State. SEC. 9. The Legislative Assembly shall have the power to pass a registration and such other laws as may be necessary to secure the purity of elections and guard against abuses of the elective franchise."

[The *Nebraska* Bill of Rights in the First Article of the State Constitution varies the usual language in declaring that—"SEC. 22. All

elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Similarly in the Third Article—"SEC. 15. The legislature shall not pass local or special laws in any of the following cases, that is to say: For * * the opening and conducting of any election, or designating the place of voting." The Seventh Article defines the right of suffrage, in—"SECTION 1. Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the State six months, and in the county, precinct or ward, for the term provided by law, shall be an elector. *First.* Citizens of the United States. *Second.* Persons of foreign birth who shall have declared their intentions to become citizens conformably to the laws of the United States, on the subject of naturalization, at least thirty days prior to an election. SEC. 2. No person shall be qualified to vote who is *non compos mentis*, or who has been convicted of treason or felony under the law of the State, or of the United States, unless restored to civil rights. SEC. 3. Every elector in the actual military service of the United States, or of this State, and not in the regular army, may exercise the right of suffrage at such place, and under such regulations as may be provided by law. SEC. 4. No soldier, seaman or marine in the army or navy of the United States, shall be deemed a resident of the State in consequence of being stationed therein."

[In *State ex rel. Stearns v. Corner et als.* (1887), 22 Neb. 265, the constitutionality of chapter 39 of the

session laws of 1887 (Compiled Statutes 1887, ch. 26 a.) was considered. It was contended that it violated section twenty-two of the Bill of Rights, and Article I of the Constitution of the State. *REESK, J.*, in delivering the opinion, in speaking of the Act says, "By the foregoing it will be seen that the right of any elector to vote must depend upon his registration within the four days set apart for that purpose, and upon the further fact that on election day his name must be found by at least three of the judges upon three of the registers. If not registered *on one of those days*—no matter what may have prevented—he cannot vote. If he has registered and by mistake his name has been left off two of the registers, he is equally disfranchised. He cannot register, nor can the registry be corrected on election day. * * Section one of Article VII, of the Constitution * * provides that every male person of the age of twenty-one years, of the classes enumerated "shall be an elector," and, of course, entitled to vote. Would the Act in question hinder or impede the exercise of that right? The question is not a new one in this country and the decisions of the courts of last resort in the different States have been substantially unanimous in holding such laws absolutely void. It has been quite as uniformly held that proper and reasonable registration laws are valid, not as imposing an additional necessary *qualification*, created by statute, but as a method of *proving* the existence of the qualifications required by the Constitution. This so long as kept within the bounds of reason, is deemed to be a proper and just protection against fraud

and a preservation of the purity of elections, upon which must depend the safety and perpetuity of republican forms of government. * *

The true rule undoubtedly is, that the legislature may require registration under reasonable restrictions as proof of the possession of the qualifications prescribed by the Constitution, but that the voter shall have the right to prove himself to be an elector, register and vote at any time prior to the closing of the polls on election day.

* * By the Act under consideration but four days in the year are given to register, and then only when three judges are present.

* * The suggestion that such a law would not be a 'hindrance or impediment to the right of a qualified voter to exercise the elective franchise' as is forbidden in the section of the Constitution above quoted, is so manifestly unreasonable that the necessity for further argument ceases."

[The right of suffrage in *Nevada* is determined by the Second Article of the Constitution—"SECTION 1. Every male citizen of the United States (not laboring under the disabilities named in this Constitution), of the age of twenty-one years and upwards, who shall have actually, and not constructively, resided in the State six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now are or hereafter may be elected by the people, and upon all questions submitted to the electors at such election; *provided*, that no person who has been or may be convicted of treason or felony in any State or Territory of the United States, unless restored to civil rights; and no person who,

after arriving at the age of eighteen years; shall have voluntarily borne arms against the United States, or held civil or military office under the so-called Confederate States, or either of them; unless an amnesty be granted to such by the Federal Government; and no idiot or insane person shall be entitled to the privilege of an elector. SEC.

2. For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse or other asylum, at public expense; nor while confined in the public prison. SEC. 3. The right of suffrage shall be enjoyed by all persons otherwise entitled to the same, who may be in the military or naval service of the United States; *provided*, the votes so cast shall be made to apply to the county and township of which said voters were *bona fide* residents at the time of their enlistment; and, *provided further*, that the payment of a poll tax or a registration of such voters shall not be required as a condition to the right of voting. Provision shall be made by law regulating the manner of voting, holding elections and making returns of such elections, wherein other provisions are not contained in this Constitution. SEC. 6. Provision shall be made by law for the registration of the names of the electors within the counties of which they may be residents, and for the ascertainment, by proper proofs, of the persons who shall be entitled to the

rights of suffrage, as hereby established, to preserve the purity of elections and regulate the manner of holding and making returns of the same; and the legislature shall have power to prescribe by law any other or further rules or oaths as may be deemed necessary, as a test of electoral qualifications. SEC. 7. The legislature shall provide by law for the payment of an annual poll tax of not less than two nor exceeding four dollars from each male person resident in the State, between the ages of twenty-one and sixty years (uncivilized American Indians excepted), one-half to be applied for State and one-half for county purposes; and the legislature may, in its discretion, make such payment a condition to the right of voting." The Fourth Article declares—"SEC. 20. The legislature shall not pass local or special laws * * * providing for opening and conducting elections of State, county or township officers, and designating the places of voting: * * SEC. 27 * *; and laws shall be passed, regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practice." At the general election of 1880, the Eighteenth Article was ratified as follows: "SECTION 1. The rights of suffrage and office-holding shall not be withheld from any male citizen of the United States by reason of his color or previous condition of servitude."

[In *Clayton v. Harris* (1871), 7 Nev. 64, the votes of electors whose names were on the registry list, but who had not taken the oath required by the Act of 1869, were held rightly received as the additional oath required by that

Act impeded or trammelled the right of suffrage by adding new qualifications. *Davies v. McKeeby* (1870), 5 Id. 369, to the same effect.

[The *New Hampshire* Bill of Rights forms Part First of the State Constitution, and provides—"ART. 11. All elections ought to be free; and every inhabitant of the State, having the proper qualifications, has equal right to elect and be elected into office." The Second Part of this Constitution contains the following provisions in relation to suffrage: "ART. 13. All persons qualified to vote in the election of Senators, shall be entitled to vote, within the district where they dwell, in the choice of representatives. ART. 28. The Senate shall be the first branch of the legislature, and the senators shall be chosen in the following manner, viz.: every male inhabitant of each town, and parish with town privileges, and places unincorporated, in this State, of twenty-one years of age and upward, excepting paupers and persons excused from paying taxes at their own request, shall have the right, at the biennial or other meetings of the inhabitants of said towns and parishes, to be duly warned and holden biennially forever, in the month of November, to vote, in the town or parish wherein he dwells, for the senator in the district whereof he is a member. ART. 30. And every person qualified as the Constitution provides, shall be considered an inhabitant, for the purpose of electing and being elected into any office or place within this State, in the town, parish and plantation where he dwelleth and hath his home. ART. 31. And the inhabitants of plantations and places unincorporated, qualified as this Con-

stitution provides, who are or shall be required to assess taxes upon themselves toward the support of government, or shall be taxed therefor, shall have the same privilege of voting for senators, in the plantations and places wherein they reside, as the inhabitants of the respective towns and parishes aforesaid have. * * ART. 42.

The governor shall be chosen biennially, in the month of November, and the votes for governor shall be received, sorted, counted, certified, and returned in the same manner as the votes for Senators; * *

ART. 60. There shall be biennially elected by ballot, five councilors, for advising the governor in the executive part of government. The freeholders and other inhabitants in each county, qualified to vote for Senators, shall, some time in the month of November, give in their votes for one councilor, which votes shall be received, sorted, counted, certified, and returned to the Secretary's office, in the same manner as the votes of Senators, to be by the Secretary laid before the Senate and House of Representatives on the first Wednesday of June."

[In *Davis v. School District of Haverhill* (1862), 44 N. H. 398, the Court said, "Where the Constitution has established a political right or privilege, but has not particularly designated the manner of its exercise, it is within the constitutional limits of the legislative power to adopt all necessary regulations in regard to the time and mode of exercising it, which are reasonable and uniform, and designed to secure and facilitate the exercise of such right in a prompt, orderly and convenient manner. Such a construction would afford

no warrant for such an exercise of legislative power as under the pretense of regularity should subvert or injuriously restrain the right itself, but a statute merely providing a mode of exercising the right, easy and reasonable, and calculated to prevent error and fraud, and secure order, regularity and uniformity in the conduct of elections, and thereby give more security to the right itself, is not open to this objection. It is hardly practicable in establishing the fundamental law of the State to fix precise regulations for its application, so minutely and accurately that they shall suffice for any case that may arise, and therefore the framers of our Constitution only settled the general principles that should govern the right of suffrage, without attempting to enact in detail rules to regulate or secure its exercise, and that instrument has fixed the qualifications of voters, but has not provided what shall be the evidence of such qualifications, or how or when it shall be furnished. The great object of these provisions of the Constitution is to extend to every citizen of proper age, with the exceptions specified, the right of suffrage, so that each may have his equal voice and proportionate weight at the polls. * * In construing the Constitution, where a strict adherence to its letter would manifestly conflict with its spirit and intent, and would defeat its object, the object and purpose of the instrument are to be regarded more than the letter. * * Unless some uniform rules as to the evidence of residence are established by the legislature, numerous questions, not always free from doubt and difficulty, are left to be determined, as they may arise, * * *

and in such case the full, fair and effectual exercise of the constitutional right of suffrage might often be endangered from the want of certainty and uniformity in the rules of evidence and decision. *

* Under the acts in question no citizen entitled to vote will ordinarily be deprived of the exercise of his right, except by his own voluntary act, and the acts themselves are mere regulations as to the evidence that the citizen dwells and has his home in a particular town, and their object is not to subvert or injuriously limit or restrain the right of suffrage, but to secure it in its full extent to those entitled to it by preventing fraudulent voting."

[The Second Article of the Constitution of *New Jersey* regulates the right of suffrage thus—"1. Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State one year, and of the county in which he claims to vote five months, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people; *provided*, that no person in the military, naval or marine service of the United States shall be considered a resident of this State, by being stationed in any garrison, barrack, or military or naval place or station within this State; and no pauper, idiot, insane person, or person convicted of a crime which now excludes him from being a witness, unless pardoned or restored by law to the right of suffrage, shall enjoy the right of an elector; *and provided further*, that in time of war, no elector in the actual military service of the State, or of the United States, in the army or navy thereof, shall be

deprived of his vote by reason of his absence from such election district; and the legislature shall have power to provide the manner in which, and the time and place at which, such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside. 2. The legislature may pass laws to deprive persons of the right of suffrage, who shall be convicted of bribery."

[The Territory of *New Mexico* has no special provisions to distinguish it from *Arizona*, *supra*, page 872.

[The Constitution of *New York* begins its First Article by an unusual form of words—"SECTION 1. No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." The qualifications of electors are contained in the Second Article, embracing this extraordinary lax provision—"SECTION 1. Every male citizen of the age of twenty-one years, who shall have been a citizen for ten days and an inhabitant of this State one year next preceding an election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere. for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people; *provided* that in time of war, no elector in the actual military service of the State, or of the

United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district; and the legislature shall have power to provide the manner in which, and the time and place at which, such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside. SEC. 2. No person who shall receive, expect or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election; and upon challenge for such cause, [&c.] * * The legislature, at the session thereof next after the adoption of this section [which went into effect, January 1, 1875,] shall, and from time to time thereafter may, enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime. SEC. 3. For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any alms-house, or other asylum, at public expense; nor while confined in any public prison.

SEC. 4. Laws shall be made for ascertaining by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established." By the eighteenth section of the Third Article, "the legislature shall not pass a private or local bill" for "The opening and conducting of elections or designating places of voting."

[In *The People ex rel. Frost et al. v. Wilson* (1875), 62 N. Y. 186, the Court held that the sixth section of the registry act of 1872 was only to be construed to prohibit the inspectors from receiving the votes of persons not registered prior to the election saying "The prohibition was designed to prevent unregistered voters from taking part in the election, and to compel registration to be made before the day of election, and not to make the right to vote of persons whose names are on the list prior to the election to depend upon the fact of the inspectors having observed all the minute directions of the act in preparing the register."

[The Constitution of *North Carolina* declares in its First Article, among its special enumeration of rights, that—"SEC. 10. All elections ought to be free. SEC. 22. As political rights and privileges are not dependent upon, or modified by property, therefore no property qualifications ought to affect the right to vote or hold office." The Sixth Article treats of suffrage in these sections—"SEC. 1. Every male person born in the United States, and every male person who has been naturalized, twenty-one years old or upward, who shall have resided in the State twelve months next preceding the election, and ninety days in the county in which he offers to vote,

shall be deemed an elector. But no person, who, upon conviction or confession in open Court, shall be adjudged guilty of felony, or any other crime, infamous by the laws of this State, and hereafter committed, shall be deemed an elector, unless such person shall be restored to the rights of citizenship in a manner prescribed by law. SEC. 2. It shall be the duty of the General Assembly to provide, from time to time, for the registration of all electors; and no person shall be allowed to vote without registration, or to register, without first taking an oath or affirmation to support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith."

[In *McDowell v. Rutherford Ry. Construction Co. et als.* (1887), 96 N. C. 514, in passing upon the provision in the Constitution (Article VI, sections one and two) regarding registration of voters, the Court says: "An essential requisite of a qualified elector—voter—is, that he shall be registered as such. * * The obvious purpose of this provision [Article VI, sections one and two] is to ascertain who are entitled to vote, and to facilitate the exercise of the elective franchise by citizens so entitled, and to prevent unlawful voting, fraud and confusion in all elections by the people. A lawful registered elector, and only he, is a qualified voter in the sense of the Constitution; and, also in the sense of all statutes, nothing to the contrary appearing. Who were the qualified voters at a particular election, were those and only those, who were then lawfully registered. *

* We may add in this connection,

that while the registration of electors is thus essential and very important, opportunity must be offered to all persons eligible to become qualified voters, to register as such, next before each election, as prescribed by law. The law encourages electors to vote, and it provides and intends that each person eligible shall have opportunity to qualify himself to that end, before an approaching election. And if such opportunity shall be withheld or denied, on purpose, by accident, or by inadvertence, such denial would vitiate and render void the election, certainly if such denial should materially affect the result. To the same effect, *Perry v. Whitaker* (1874), 71 Id. 475; *Van Bokkelaan v. Canaday* (1875), 73 Id. 198; *Smith et al. v. The City of Wilmington et al.* (1887), 98 Id. 343.

[The Constitution of *North Dakota*, adopted in 1889 on the admission of the State, regulates the Elective Franchise in Article V so that—"SEC. 121. Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the State one year, in the county six months, and in the precinct ninety days next preceding any election, shall be deemed a qualified elector at such election: *First.* Citizens of the United States. *Second.* Persons of foreign birth who shall have declared their intention to become citizens, one year and not more than six years prior to such election, conformably to the naturalization laws of the United States. *Third.* Civilized persons of Indian descent who shall have severed their tribal relations two years next preceding such election. SEC. 125. No elector shall

be deemed to have lost his residence in this State by reason of his absence on business of the United States, or of this State, or in the military or naval service of the United States. SEC. 126. No soldier, sailor, seaman or marine in the army or navy of the United States, shall be deemed a resident of this State in consequence of his being stationed therein. SEC. 127. No person who is under guardianship, *non compos mentis* or insane, shall be qualified to vote at any election, nor shall any person convicted of treason or felony, unless restored to civil rights."

[The Constitution of *Ohio*, in its Fifth Article, declares that—"SECTION 1. Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the State one year next preceding the election, and of the county, township, or ward in which he resides, such time as may be provided by law, shall have the qualifications of an elector and be entitled to vote at all elections. SEC. 4. The general assembly shall have power to exclude from the privileges of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime. SEC. 5. No person in the military, naval, or marine service of the United States, shall, by being stationed in any garrison, or military or naval station, within the State, be considered a resident of this State. SEC. 6. No idiot or insane person shall be entitled to the privileges of an elector."

[In *Monroe v. Collins* (1867), 17 Ohio St. 665, it is said, "What the legislature cannot do directly, it cannot do by indirection. If it has no power expressly to deny or take

away the right, it has none to define it away or unreasonably to abridge or impede its enjoyment by laws professing to be merely remedial. The power of the legislature in such cases is limited to laws *regulating* the enjoyment of the right, by facilitating its lawful exercise and preventing its abuse. All reasonable latitude should be allowed the legislature in the exercise of this power of regulation, and every reasonable intendment in favor of the constitutionality of laws enacted for that purpose, should be made by the courts. Such laws are not to be held unconstitutional unless *clearly* so, and if they will at all bear a construction which makes them consistent with the Constitution, they are to receive that construction, and so to be upheld. The true line between laws which take away or abridge the right of suffrage, and those which may lawfully be enacted to regulate its exercise, is laid down by the Supreme Court of Massachusetts, in *Capen v. Foster* [*supra*] * * that laws of the latter description must be *reasonable, uniform and impartial*, and must be calculated to *facilitate and secure* rather than to *subvert or impede* the exercise of the right to vote." This ruling of the Court is substantially followed and approved of in *The State ex rel. v. Constantine* (1884), 42 Ohio St. 437. In the subsequent case of *Daggell v. Hudson* (1885), 43 Id. 548, the Court passed upon the validity of the Act of May 4, 1885, requiring the registration of voters in Cincinnati and Cleveland, in all cases as a condition to the right of suffrage, and only allowing seven days in the year in which to register and correct the registration, and mak-

titled to vote after residing in the State six months: Provided, that white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year and in the election district ten days as aforesaid, shall be entitled to vote, although they shall not have paid taxes."

[The same Article continues—
"SEC. 4. All elections by the citizens shall be by ballot. Every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the elector who presents the ballot. Any elector may write his name upon his ticket or cause the same to be written thereon and attested by a citizen of the district. The election officers shall be sworn or affirmed not to disclose how any elector shall have voted unless required to do so as witnesses in a judicial proceeding. SEC. 6. Whenever any of the qualified electors of this Commonwealth shall be in actual military service, under a requisition from the President of the United States or by the authority of this Commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual places of election. SEC. 7. All laws regulating the holding of elections by the citizens or for the registration of electors shall be uniform throughout the State, but no elector shall be deprived of the privilege of voting by reason of his name not being registered. SEC. 8. Any person who shall give, or promise or offer to give, to an elec-

tor, any money, reward or other valuable consideration for his vote at an election, or for withholding the same, or who shall give or promise to give such consideration to any other person or party for such elector's vote or for the withholding thereof, and any elector who shall receive or agree to receive, for himself or for another, any money, reward or other valuable consideration for his vote at an election, or for withholding the same, shall thereby forfeit the right to vote at such election, and any elector whose right to vote shall be challenged for such cause before the election officers, shall be required to swear or affirm that the matter of the challenge is untrue before his vote shall be received. SEC. 9. * * ; and any person convicted of wilful violation of the election laws shall, in addition to any penalties provided by law, be deprived of the right of suffrage absolutely for the term of four years. SEC. 13. For the purpose of voting no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service, either civil or military, of this State, or of the United States, nor while engaged in the navigation of the waters of the State or of the United States, or on the high seas, nor while a student of any institution of learning, nor while kept in any poorhouse or other asylum at public expense, nor while confined in public prison."

[Under the Constitution of 1838, the Supreme Court of Pennsylvania held a registry law to be invalid, because no Constitutional qualification of a voter could be abridged, added to or altered by

[In *White v. Commissioners of Multnomah County* (1886), 13 Or. 317, the question as to the constitutionality of the registry act was raised, the Court declaring such act *ipso facto* void, WALDO, C. J., saying, "The right to vote under the Constitution is a vested constitutional right. 'When I say a right is vested, I mean that he has the power to do certain actions, or to possess certain things, according to the law of the land.' If the right be vested by the Constitution, it denotes a right that cannot under the Constitution, be taken away. It would seem that every case, from *Capen v. Foster* [*supra*,] down, which has sustained against similar objections the constitutionality of a registry law which requires previous registry as a prerequisite to the right to vote, has taken it for granted that such laws were mere rules of procedure. * * When the right is secured by the Constitution, such laws, having merely a legislative sanction are void. * * Under this Act, he who goes to the polls on election day possessing every constitutional qualification, may find that the legislature has stepped in between him and the Constitution. He finds his vote denied because he has not done something which the legislature has required him to do. He discovers that he is not a qualified elector, and yet he is told that his omission to do the act which had effect to disqualify him, is not itself a disqualification; or if he have performed the act, that his performance does not constitute a qualification. This will not square with the logic of facts. This distinction between what is substantive and what is modal is confounded. He who has a right to

something to-morrow can never be secure of his right until to-morrow comes. If this can result, then the Constitution does not mean what it says." This opinion was concurred in by LORD, J., and dissented from by THAYER, J.

The Constitution of *Pennsylvania*, proclaimed January 7, 1874, differed from the Constitution of 1838 in the omission of the following bracketted words and the insertion of those in italics: ARTICLE [III.], VIII. [Of] *Suffrage and Elections*. SECTION I. [In elections by the citizens,] Every [white freeman] *male citizen* [of the age of] *twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections: First.—He shall have been a citizen of the United States at least one month. Second.—He shall have [having] resided in [the] this State one year (or if, having previously been a qualified elector or native born citizen of the State, he shall have removed therefrom and returned, then six months), immediately preceding the election. Third.—He shall have resided in the election district where he [offers] shall offer to vote [ten days] at least two months immediately preceding the election. Fourth.—If twenty-two years of age or upwards, he shall have paid [and] within two years [paid] a State or county tax, which shall have been assessed at least [ten days] two months and paid at least one month before the election [shall enjoy the rights of an elector. But a citizen of the United States, who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district and paid taxes as aforesaid, shall be en-*

an elector whose name is not on the list of registered voters, to produce the required affidavits at the time he offers to vote, and that the election officers have no power to waive the production of the essential proofs. * * The Constitution contemplates that the electors shall be ascertained previous to the receiving of their votes, not that all men, qualified and unqualified, may cast their ballots, and the legal be separated from the illegal, after the election : " TRUNKY, J., *In re Election of McDonough* (1884), 105 Pa. 488, 495.

[By the Third Article of the Constitution of Pennsylvania—"SEC. 7. The General Assembly shall not pass any local or special law * * for the opening and conducting of elections, or fixing or changing the place of voting ; * *"]

In *Rhode Island*, a registry law was upheld, although no proof could be made on the day of election, so as to entitle the elector to vote. The law, however, allowed him to apply for registration, up to within a few days of the day of election ; and especial emphasis was laid upon this fact : *In re The Polling Lists* (1881), 13 R. I. 729 ; *Ward v. Joslin* decided Dec. 10, 1889, by the Supreme Court of this State. [The first of these citations was an opinion, at the request of the Legislature, based upon the following Sections of Article Second of the Constitution of 1842—"SECTION 1. Every male citizen of the United States of the age of twenty-one years, who has had his residence and home in this State for one year, and in the town or city, in which he may claim a right to vote, six months, next preceding the time of voting, and who is really and truly possessed in his

own right of real estate in such town or city of the value of one hundred and thirty four dollars, over and above all incumbrances, or which shall rent for seven dollars per annum over and above any rent reserved or the interest of any incumbrances thereon, being an estate in fee simple, fee tail, for the life of any person, or an estate in reversion or remainder, which qualifies no other person to vote, the conveyance of which estate, if by deed, shall have been recorded at least ninety days ; shall thereafter have right to vote in the election of all civil officers and on all questions in all legal town or ward meetings so long as he continues so qualified. And if any person hereinbefore described shall own any such estate within this State out of the town or city in which he resides, he shall have a right to vote in the election of all general officers and members of the general assembly in the town or city in which he shall have had his residence and home for the term of six months next preceding the election, upon producing a certificate from the clerk of the town or city in which his estate lies, bearing date within ten days of the time of his voting, setting forth that such person has a sufficient estate therein to qualify him as a voter ; and that the deed, if any, has been recorded ninety days." [This Section was amended in 1864, by providing for voting by soldiers and sailors in the service of the United States.]

"SEC. 6. The general assembly shall have full power to provide for a registry of voters, to prescribe the manner of conducting the elections, the form of certificates, the nature of the evidence to be required in

case of a dispute as to the right of any person to vote, and generally to enact all laws necessary to carry this article into effect, and to prevent abuse, corruption, and fraud in voting."

[The Second Section of the same article has been amended by Chapter 672 of the Laws of 1888, by adding to the Amendments, Article VII—the words inserted being in *italics* and those omitted (except the temporary clause) being bracketted—"SECTION 1. Every male [native] citizen of the United States, of the age of twenty-one years, who has had [the residence herein required—i. e.,] his residence and home in this State for two years, and in the town or city in which he may offer to vote, six months next preceding the time of *his* voting, and whose name shall be registered in the town or city where he resides, on or before the last day of December in the year next preceding the time of his voting, [and who shall show by legal proof that he has for and within the year next preceding the time he shall offer to vote, paid a tax or taxes assessed against him in any town or city in this State to the amount of one dollar, or that he has been enrolled in a military company in this State, been equipped and done duty therein, according to law, and at least for one day during such year,] shall have a right to vote in the election of all civil officers and on all questions in all legally organized town or ward meetings: *Provided*, That no person shall at any time be allowed to vote in the election of the city council of [the city of Providence] *any city*, or upon any proposition to impose a tax, or for the expenditure of money in any town or city, unless he shall,

within the year next preceding, have paid a tax assessed upon his property therein, valued at least at one hundred and thirty four dollars."

[In *South Carolina*, the Court held in *State ex rel. Stock et als. v. Schnierle* (1852), 5 Rich. (S. C.) that a registration made on a Sunday was valid and in time. In this State, the First Article of the Constitution is a Declaration of Rights, containing—"SECTION 31. All elections shall be free and open, and every inhabitant of this Commonwealth, possessing the qualifications provided for in this Constitution, shall have an equal right to elect officers and be elected to fill public office. SECTION 33. The right of suffrage shall be protected by laws regulating elections, and prohibiting under adequate penalties, all undue influences from power, bribery, tumult or improper conduct. SECTION 34. Representation shall be apportioned according to population, and no person in this State shall be disfranchised or deprived of any of the rights or privileges now enjoyed, except by the law of the land or the judgment of his peers." The Eighth Article treats of the Rights of Suffrage—"SECTION 2. Every male citizen of the United States, of the age of twenty-one years and upwards, not laboring under the disabilities named in this Constitution, without distinction of race, color, or former condition, who shall be a resident of this State at the time of the adoption of this Constitution, or who shall thereafter reside in this State one year, and in the County in which he offers to vote, sixty days next preceding any election, shall be entitled to vote for all officers that

are now or hereafter may be elected by the people, and upon all questions submitted to the electors at any elections: *Provided*, That no person shall be allowed to vote or hold office, who is now or hereafter may be disqualified therefor by the Constitution of the United States, until such disqualification shall be removed by the Congress of the United States: *Provided further*, That no person, while kept in alms-house, or asylum, or of unsound mind, or confined in any public prison, shall be allowed to vote or hold office. SECTION 3. It shall be the duty of the General Assembly to provide from time to time for the registration of all electors. SECTION 4. For the purpose of voting, no person shall be deemed to have lost his residence by reason of absence while employed in the service of the United States, nor while engaged upon the waters of this State or the United States, or of the high seas, nor while temporarily absent from the State. SECTION 5. No soldier, seaman, or marine in the army or navy of the United States shall be deemed a resident of this State in consequence of having been stationed therein. SECTION 8. The General Assembly shall never pass a law that will deprive any of the citizens of this State of the right of suffrage, except for treason, murder, robbery, or dueling, whereof the person shall have been duly tried and convicted. SECTION 12. No person shall be disfranchised for felony or other crimes committed while such person was a slave."

[The Constitution of *South Dakota*, adopted on the admission of the State, provides in the Bill of Rights contained in its Sixth Arti-

cle, that — "SEC. 19. Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Soldiers in time of war may vote at their post of duty, in or out of the State, under regulations to be prescribed by the legislature." And in the Seventh Article, on Elections and Rights of Suffrage, — "SECTION 1. Every male person [a] resident of this State, who shall be of the age of twenty-one years and upwards, not otherwise disqualified, belonging to either of the following classes, who shall be a qualified elector under the laws of the Territory of Dakota, at the date of the ratification of this Constitution by the people, or who shall have resided in the United States one year, in the State six months, in the county thirty days, and in the election precinct where he offers to vote, ten days next preceding any election, shall be deemed a qualified elector at such election: *First*: Citizens of the United States. *Second*: Persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States upon the subject of naturalization." Sections 6, 7 and 8 are literally the same as Sections 125, 126 and 127 of the Constitution of *North Dakota*, *supra*.

[The Declaration of Rights in the First Article of the Constitution of *Tennessee* declares — "SECTION 5. That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury, of some infamous crime previously ascertained and declared by

law, and judgment thereon by court of competent jurisdiction." The Right of Suffrage is defined in the Fourth Article—"SECTION 1. Every male person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein he may offer his vote for six months next preceding the day of election, shall be entitled to vote for members of the General Assembly, and other civil officers for the county or district in which he resides; and there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of election, when he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the Legislature shall prescribe, and at such times as may be prescribed by law, without which his vote cannot be received. And all male citizens of the State shall be subject to the payment of poll taxes and the performance of military duty within such ages as may be prescribed by law. The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot-box. SEC. 2. Laws may be passed, excluding from the right of suffrage, persons who may be convicted of infamous crimes."

[In *Ridley v. Sherbrook* (1866), 3 Cold. (Tenn.) 569, where the register had refused to enter on the register, the name of the complainant, who had been convicted of certain offences, but had received a full pardon, the Court said, "The elective franchise is not an inalienable right or privilege, but a politi-

cal right, conferred, limited or withheld at the pleasure of the people, acting in their sovereign capacity. Each State may define it in its own Constitution, or empower its Legislature to do so. The right once granted may be taken away by the exercise of sovereign power or forfeited for crime, under the laws of the State; and if taken away by the sovereign power of the State, (as by an alteration in the Constitution) no vested right is violated, or bill of attainder passed, or act of pains and penalties, in the sense of the Constitution of the United States. * * A political right * * is a political privilege or grant, that may be extended or recalled, at the will of the sovereign power." The Court held that though he had a right to vote under the Constitution of 1834, the Legislature having changed Article IV, section one of the Constitution, he could not claim the right to register as a voter, unless he brought himself within the provisions of the act, which was valid and binding.

[The First Article of the Constitution of *Texas* contains the Bill of Rights, including—"SEC. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of law of the land." The Third Article provides—"SEC. 56. The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing: * * For the opening and conducting elections, or fixing or changing the places of voting; * * " Suffrage is regulated in the Sixth Article—"SECTION 1.—The following classes of persons shall not be al-

lowed to vote in this State, to wit: First—Persons under twenty-one years of age. Second—Idiots and lunatics. Third—All paupers supported by any county. Fourth—All persons convicted of any felony, subject to such exceptions as the Legislature may make. Fifth—All soldiers, marines and seamen, employed in the service of the army or navy of the United States. SEC. 2.—Every male person subject to none of the foregoing disqualifications, who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector; and every male person of foreign birth, subject to none of the foregoing disqualifications, who, at any time before an election, shall have declared his intention to become a citizen of the United States, in accordance with the federal naturalization laws, and shall have resided in this State one year next preceding such election, and the last six months in the county in which he offers to vote, shall also be deemed a qualified elector; and all electors shall vote in the election precinct of their residence; *provided*, that electors living in any unorganized county, may vote at any election precinct in the county to which such county is attached, for judicial purposes. SEC. 3.—All qualified electors of the State, as herein described, who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all other elective officers; but in all

elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town; *provided*, that no poll tax for the payment of debts thus incurred shall be levied upon the persons debarred from voting in relation thereto. SEC. 4.—In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets, and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot-box; but no law shall ever be enacted, requiring a registration of the voters of this State." Among the General Provisions in the Sixteenth Article, are—"SEC. 2.—Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who may have been or shall hereafter be convicted of bribery, perjury, forgery, or other high crimes. The privilege of free suffrage shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influence therein from power, bribery, tumult, or other improper practice. SEC. 4.—Any citizen of this State who shall, after the adoption of this Constitution, fight a duel with deadly weapons, or send or accept a challenge to fight a duel with deadly weapons, either within this State or out of it, or who shall act as second, or knowingly assist, in any manner, those thus offending shall be deprived of the right of suffrage, or of holding any office of trust or profit under this State. SEC. 9.—Absence on business of the State, or of the United States, shall not forfeit a residence once

obtained, so as to deprive anyone of the right of suffrage, or of being elected or appointed to any office under the exceptions contained in this Constitution."

[The Territory of Utah was made the subject of the following special provisions in the Act of March 3, 1887 (24 Stat. at Large 639)—

"SEC. 20. That it shall not be lawful for any female to vote at any election hereafter held in the Territory of Utah for any public purpose whatever, and no such vote shall be received or counted or given effect in any manner whatever; and any and every act of the legislative assembly of the Territory of Utah, providing for or allowing the registration or voting by females is hereby annulled. SEC. 21. That all laws of the legislative assembly of the Territory of Utah, which provide for numbering or identifying the votes of the electors at any election in said Territory, are hereby disapproved and annulled; but the foregoing provision shall not preclude the lawful registration of voters, or any other provisions for securing fair elections, which do not involve the disclosure of the candidates for whom any particular elector shall have voted. SEC. 24. That every male person, twenty-one years of age, resident in the Territory of Utah, shall, as a condition precedent to his right to register or vote at any election in said Territory, take and subscribe an oath or affirmation, before the registration officer of his voting precinct, that he is over twenty-one years of age, and has resided in the Territory of Utah for six months then last passed and in the precinct for one month immediately preceding the date thereof, and that

he is a native born (or naturalized, as the case may be) citizen of the United States, and further state in such oath or affirmation, his full name, with his age, place of business, his status, whether single or married, and, if married, the name of his lawful wife, and that he will support the Constitution of the United States, and will faithfully obey the laws thereof, and especially will obey the act of Congress approved March twenty-second, eighteen hundred and eighty-two, entitled [&c., 22 Stat. at Large 30,]

* * and will also obey this act in respect of the crimes in said act defined and forbidden, and that he will not, directly or indirectly, aid or abet, counsel or advise, any other person to commit any of said crimes. * * No person shall be entitled to vote in any election in said Territory, or be capable of jury service, or hold any office of trust or emolument in said Territory, who shall not have taken the oath or affirmation aforesaid. No person who shall have been convicted of any crime under this act, or under the act of Congress aforesaid, approved March twenty-second, eighteen hundred and eighty-two, or who shall be a polygamist or who shall associate or cohabit polygamously with persons of the other sex, shall be entitled to vote in any election in said Territory, or be capable of jury service, or to hold any office of trust or emolument in said Territory." Otherwise, the Territory is under the same acts, as *Arizona, supra*, page 872.

[The Constitution of *Vermont* declares in its First Chapter, that the rights of the inhabitants include — "ARTICLE 8th. That all elections ought to be free and with-

out corruption, and that all freemen having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and to be elected into office, agreeably to the regulations made in this Constitution." By the Plan or Frame of Government contained in the Second Chapter, it is ordained that—"SECTION 21st. Every man of the full age of twenty-one years, having resided in this State for the space of one whole year next before the election of Representatives, and is of a quiet and peaceable behaviour, and will take the following oath or affirmation, shall be entitled to all the privileges of a freeman of this State. *You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the State of Vermont, you will do so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favour of any man.* SECTION 34th. All elections, whether by the people or by the Legislature, shall be free and voluntary: and any elector who shall receive any gift or reward for his vote, in meat, drink, monies or otherwise, shall forfeit his right to elect at that time, and suffer such other penalty as the law shall direct; * * * The Thirty-ninth Section of the same chapter is changed in this respect by the Amendment—"ARTICLE [1.] No person, who is not already a freeman of this State, shall be entitled to exercise the privileges of a freeman, unless he be a natural born citizen of this or some one of the United States, or until he shall have been naturalized, agreeably to the acts of Congress."

[In *State ex rel. Cawley v. O'Hearn* (1886), 58 Vt. 718, the Court said, "The act requiring a check-list does not say that one whose name is on it is a legal voter, but he may vote at that election; nor that every one whose name is not thereon has no right to have it there; it says that for the purposes of voting upon that day, it is conclusive." Consequently the Court examined whether the list was properly made up, and *Hyde v. Brush*, (*supra*, page 876) was distinguished as deciding merely that the list could not be questioned on election day. In neither case was there an addition to the constitutional qualifications.

[The Constitution of *Virginia* begins with a Bill of Rights comprised in the First Article, and declaring, among other things—"8. That all elections ought to be free, and that all men, having sufficient evidence of permanent common interests with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not in like manner, assented, for the public good." The Elective Franchise is defined by the Third Article, thus—"SEC. 1. Every male citizen of the United States, twenty-one years old, who shall have been a resident of this State twelve months, and of the county, city or town in which he shall offer to vote three months next preceding any election, shall be entitled to vote for members of the general assembly and all officers elected by the people: *provided*, that no officer, soldier, seaman, or marine of the United States

army or navy, shall be considered a resident of this State by reason of being stationed therein: and provided, also, that the following persons shall be excluded from voting: *First.* Idiots and lunatics. *Second.* Persons convicted of bribery at any election, embezzlement of public funds, treason, felony, or petit larceny. *Third.* No person who, while a citizen of this State, has, since the adoption of this Constitution, fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, either within or beyond the boundaries of this State, or knowingly conveyed a challenge, or aided or assisted in any manner in fighting a duel, shall be allowed to vote or hold any office of honor, profit, or trust under this Constitution."

[The First Article of the Constitution of *Washington*, declares, among other rights, that—"SEC. 19. All elections shall be free and equal, and no power, civil or military, shall at any time interfere." Elections and Elective Rights are regulated in the Sixth Article, thus—"SECTION 1. All male persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States, *provided* that Indians not taxed shall never be allowed the elective franchise: *provided, further,* that all male persons who at the time of the adoption of this Constitution, are qualified electors of the Territory, shall be electors. They shall have lived in the State one year, and in the county ninety days and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to

vote." The other male persons, qualified by the election law contained in Chapter 238 of the Code of Washington (ed. 1881) were "SEC. 3050. All American male citizens, above the age of twenty-one years, and all American male half-breeds over that age, who have adopted the habits of the whites, and all other male inhabitants of this Territory, above that age, who shall have declared, on oath, their intentions to become citizens, at least six months previous to the day of election, and shall have taken an oath to support the Constitution of the United States, and the Organic Act of this Territory, at least six months previous to the day of election, and shall have resided six months in the Territory, and thirty days in the county next preceding the day of election, and none other, shall be entitled to hold office or vote at any election in this Territory: * * ." The same article of the State Constitution continues—"SEC. 3. All idiots, insane persons and persons convicted of infamous crimes, unless restored to civil rights, are excluded from the elective franchise. SEC. 4. For the purpose of voting and eligibility to office, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while in the civil or military service of the State or of the United States, nor while a student at any institution of learning, nor while kept at public expense in any poor-house nor other asylum, nor while confined in public prison, nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas. SEC. 6. All elections shall be by ballot. The legislature shall pro-

vide for such method of voting as will secure to every elector, absolute secrecy in preparing and depositing his ballot. SEC. 7. The legislature shall enact a registration law, and shall require a compliance with such a law before any elector shall be allowed to vote, *provided* that this provision is not compulsory upon the legislature except as to cities and towns having a population of over five hundred inhabitants. In all other cases, the legislature may or may not require registration as a prerequisite to the right to vote, and the same system of registration need not be adopted for both classes."

[In the Constitution of *West Virginia*, the Bill of Rights, in the Third Article, declares that—"11. Political tests, requiring persons, as a pre-requisite to the enjoyment of their civil and political rights, to purge themselves by their own oaths, of past alleged offences, are repugnant to the principles of free government, and are cruel and oppressive. No religious or political test oath shall be required as a pre-requisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or employment. Nor shall any person be deprived by law, of any right or privilege, because of any act done prior to the passage of such law." The Fourth Article deals with elections thus—"1. The male citizens of the State shall be entitled to vote at all elections held within the counties in which they respectively reside: but no person who is a minor, or of unsound mind, or a pauper, or who is under conviction of treason, felony, or bribery in an election, or who has not been a resident of the State for one year,

and of the county in which he offers to vote, for sixty days next preceding such offer, shall be permitted to vote while such disability continues; but no person in the military, naval or marine service of the United States shall be deemed a resident of this State by reason of being stationed therein.

2. In all elections by the people, the mode of voting shall be by ballot; but the voter shall be left free to vote by either open, sealed, or secret ballot, as he may elect. 11. The Legislature shall prescribe the manner of conducting and making returns of elections, and of determining contested elections; and shall pass such laws as may be necessary and proper to prevent intimidation, disorder or violence at the polls, and corruption or fraud in voting, counting the vote, ascertaining or declaring the result, or fraud in any manner, upon the ballot. 12. No citizen shall ever be denied or refused the right or privilege of voting at an election, because his name is not, or has not been registered or listed as a qualified voter. "By the Sixth Article—"39. The Legislature shall not pass local or special laws in any of the following enumerated cases: that is to say, for * * The opening or conducting of any election, or designating the place of voting: * * "

The *Wisconsin* Constitution contains a clause similar to that of Iowa, the amendment ratified November 7, 1882, reading—"ART. III. SEC. 1. Every male person, of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the State for one year preceding any election, and in the election district where he offers to

vote such time as may be prescribed by the legislature, not exceeding thirty days, shall be deemed a qualified elector at such election. 1. Citizens of the United States. 2. Persons of foreign birth who shall have declared their intentions to become citizens conformably to the laws of the United States on the subject of naturalization. 3. Persons of Indian blood who have once been declared by law of Congress to be citizens of the United States, any subsequent law of Congress to the contrary notwithstanding. 4. Civilized persons of Indian descent, not members of any tribe; *provided*, that the legislature may at any time, extend, by law, the right of suffrage to persons not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast at such election; and *provided further*, that in incorporated cities and villages, the legislature may provide for the registration of electors, and prescribe proper rules and regulations."

A registry law was passed in that State, and held valid, "The Constitution vests every person having certain qualifications at the time of any election, with the right of suffrage at such election. Some of these qualifications rest on time which may ripen, or facts which may accrue, on the very day of election. So that one may well become vested with the right of franchise pending the election, who was not so vested before, or perhaps entitled to be registered at the time of registry. Some entitled to the franchise, may be sick, or absent, or imprisoned, or

otherwise disabled, at the time of registry. But the Constitution vests and warrants the right at the time of election. And everyone having the Constitutional qualification then, may go to the polls, vested with the franchise, of which no statutory condition precedent can deprive him. * * Statutes cannot impair the right, though they may regulate its exercise. Every statute regulating it, must be consistent with the Constitutionally qualified voter's right of suffrage when he claims his right at an election. These statutes may require proof of the right, consistent with the right itself. And such we understand to be the theory of the registry law; 'to guard against the abuse of the elective franchise, and to preserve the purity of elections'; not to abridge or impair the right, but to require reasonable proof of the right. It was undoubtedly competent for the legislature to provide for a previous registry of voters, as one mode of proof of the right; so that it should not be a condition precedent to the right itself at the election, but, failing the proof of registry, left other proof open to the voter at the election, consistent with his present right. So the legislature could provide for challengers of voters at the election, and for the oath or proof necessary then to assert their right against challenge. And this we take to be the exact effect of the registry law as already construed by this Court. If a voter's name is not on the register at an election, he is in effect challenged by the statute, and required to furnish prescribed proof of his right. If there be no register at an election, the statutory challenge goes to all the voters; they must

furnish the requisite proofs of right. These requirements are not unreasonable, and are consistent the present right to vote, as secured by the Constitution. The statute imposes no condition precedent to the right; it only requires proof that the right exists. The voter may assert his right, if he will, by proof that he has it; may vote, if he will, by reasonable compliance with the law. His right is unimpaired; and if he be disfranchised, it is not by force of the statute, but by his own voluntary refusal of proof that he is enfranchised by the Constitution": RYAN, C. J. *State ex rel Wood v. Baker* (1876), 38 Wis. 71, 86-7.

"But if he were such an agent in the execution of the registry law as to be responsible in his right of suffrage for its nonfeasance or malfeasance; if he were bound to see to the putting of his name and residence on the register, or charged against his right with irregularities or defects of the register, so as to impair his right of suffrage at the election, it might be impossible to sustain the registry law under the Constitution. But we cannot think that such is a necessary or even an admissible construction of the statute:" Id. 87.

"And if failure or error in the duty of the inspectors, of which voters have no notice in fact, could operate directly or indirectly to disfranchise voters at the election, we should encounter the same difficulty in sustaining the statute under the Constitution. Nonfeasance or malfeasance of public officers could have no effect to impair a personal, vested, Constitutional right. We see no such purpose in the registry law. Surely it would be a strange attempt to pro-

tect the elective franchise and preserve the purity of elections, to put it in the power of inspectors of elections, by careless accident or corrupt design, to disfranchise Constitutional voters. This, we take it, would be the actual effect of avoiding elections where the inspectors use defective or irregular registers at the election, as official and valid; so entrapping voters into dispensing with proof of their right, required and authorized only when their names are not registered at the election": Id. 87-8.

Notwithstanding the strong opinions from Wisconsin, quoted above, the Supreme Court decided that the registry law of 1879 was invalid. The act required a previous registration, except in the case of one becoming qualified between the last day for registration and the day of election; and absolutely prohibited anyone not registered from voting, except as above stated. "By the effect of this law," said the Court, "the elector *may*, and in many cases *must* and *will*, lose his vote, by being utterly unable to comply with this law by reason of absence, physical disability, or non-age, and an elector can lose his vote without his own fault or neglect in this particular. * * * The vice is, that the law disfranchises a constitutionally qualified elector, without his default or negligence, and makes no exception in his favor, and provides no method, chance or opportunity for him to make proof of his qualification on the day of election, the only time, perchance, when he could possibly do so. The law undertakes to do what no law can do, and that is to deprive a person of an absolute right without his laches, default, negligence or consent; and, in order to exercise

and enjoy it, to require him to accomplish an impossibility": *Dells v. Kennedy* (1880), 40 Wis. 555. [Associate Justice ORTON, writing the opinion of the Court, adopted the language of Chief Justice THOMPSON of Pennsylvania, in *Page v. Allen*, *supra*. A similar view was taken in Ohio, where the elector's right to vote could not be established within the five days immediately preceding the election; and only seven days in the year were allowed for registration: *Daggett v. Hudson*, (1885), 43 Ohio St. 548; and in *White v. Mullno-mah Co.* (1886), 13 Ore. 317, and *State v. Corner* (1887), 22 Neb. 265. It is competent for the Legislature to prescribe questions to be propounded to voters, calculated to draw from them proof of their qualification to vote at an election, and require the voters to answer them before they can vote; but this does not prescribe any new qualification to the voter: *State ex rel. Cothren v. Lean* (1859), 9 Wis. 579; *State ex rel. Doerflinger v. Hilmanlle* (1867), 21 Id. 566.

[The Constitution of *Wyoming* is not at hand, and will be mentioned in the *Legal Notes* of a succeeding number.

Of course, where the constitution provides for a registry law, no reasonable question as to its validity can arise, unless it has the effect to actually disfranchise electors: *Hawkins v. Supervisors of Carroll Co.* (1874), 50 Miss. 735; *Hardesty v. Taft* (1865), 23 Md. 512; *Anderson v. Baker* (1865), Id. 531; *Auld v. Wallon* (1857), 12 La. Ann. 129; but while admitting that a reasonable registration law is constitutional, the Supreme Court of Massachusetts held a law invalid which required all naturalized voters to

register thirty days before election day: *Kincen v. Wells* (1887), 144 Mass. 497; *Attorney General v. City of Detroit* (1879), 78 Mich. 545. A similar line of reasoning to that in this case was pursued in *Monroe v. Collins* (1867), 17 Ohio St. 665; *Rison v. Farr* (1865), 24 Ark. 161.

Where the officers of election failed to make any registry of the election, and no method was provided for the receiving proof on election day of an elector's right to vote, it was held that all ballots cast by such unregistered electors were invalid, and could not be counted. *People ex rel. Foley v. Kopplekom* (1868), 16 Mich. 342; *Eusworth v. Albin* (1870), 46 Mo. 450; *People ex rel. Elsworth v. Laine* (1867), 33 Cal. 55; *Webster v. Byrnes* (1867), 34 Id. 273; *People ex rel. Frost v. Wilson* (1875), 62 N. Y. 186; *State v. Bond* (1866), 38 Mo. 425; *State v. Cook* (1867), 41 Id. 593; *Nefzger v. O. D. and St. Paul Ry. Co.* (1873), 36 Ia. 642; *Zeiler v. Chapman* (1874), 54 Mo. 502; *State v. Sumler Co.* (1884), 20 Fla. 859; *Farren v. Buffalo Co.* (1888), 5 Dak. 36. And where such proofs could be furnished on election day but were not the ballots then cast were held void; the Court however saying, that if the proofs had been furnished, the ballots would have been legal, although there was no registry whatever: *State v. Hilmanlle* (1867), 21 Wis. 566; *State v. Stumpf* (1869), 23 Wis. 630.

In Illinois it was held that where an unregistered elector voted at an election without any proof of right, if it does not appear that he was challenged, or any objection made to his voting, the presumption must be that he was a legal voter, so known to the judges of election;

and the ballots must be counted: 498; *Kuykendall v. Harker* (1878),
Dale v. Irwin (1875), 78 Ill. 170; 89 Id. 126; *Hodge v. Linn* (1881),
Clark v. Robinson (1878), 88 Id. 100 Id. 397. W. W. THORNTON.

EDITORIAL NOTE.

The increased size of this number requires for once the omission of the Abstracts of Recent Decisions, which will be continued from month to month but with a selection more especially designed to contain valuable cases in the various United States Courts in preference to those in the State Courts as less likely to fall under professional notice.

A new department, here begun, will precede the Abstracts hereafter, and will especially be devoted to noticing changes in the laws embodied in the leading articles and annotations contained in the recent volumes of this periodical. It is not intended to make these Editorial Notes less valuable for reference than the leading articles and the annotations; rather the contrary, as otherwise slight changes in the law could not be noticed until they had accumulated into a mass sufficient to form another article or annotation.

Advantage will be taken of the space afforded in the few pages devoted each month to these Editorial Notes, to furnish the statutory changes in the law, and as often as possible in the literal language of the statutes themselves. There is so much difficulty in obtaining a library of the session laws and the actual use for it is so infrequent that the printing of the statutes may often save the expense of purchasing the volumes of the laws. Moreover, it is dangerous to cite cases dependent upon statute law without having the statute at hand to confirm the summary made by a law writer; at least, the evident similarity of statutes in different states affords good reason for citing decisions from one state in another when the similarity can be easily established. This has been notably true in the use of the leading article on Legal Holidays (*ante*, page 137.)

Thus it is hoped to make the AMERICAN LAW REGISTER more fully what its name signifies—a record of American Law from month to month; omitting all temporary and unimportant as well as merely local decisions and statutes, and excluding other interesting and even valuable articles which cannot be classified with reference matter. Such excluded matter will continue to appear in the pages of the *Current Comment*.

JOHN B. UHLE.

INDEX.

ACCIDENT INSURANCE.

CONDITION

That insurance shall not cover entering or trying to enter or leave a moving conveyance using steam as a motive power, railroad employees excepted, does not debar a baggage checker of a transfer company from recovering 754

EMPLOYEE.

Baggage checker of a transfer company, living in one place, whose business is to board and meet trains and check baggage to other lines is a railroad employee within the terms of an accident policy . . . 794

EVIDENCE.

Marks of extreme violence, recently inflicted and causing injuries resulting in death, constitute *prima facie* evidence of death "through external, violent and accidental means" 133

ACTION.

DEMURRER.

Answer alleging that note was executed for a certain consideration, and deposited with a bank, not to be delivered up until the consideration is fulfilled, is not demurrable 547

ADMIRALTY.

JURISDICTION

Of the admiralty court attaches only when the damage has been done and the injury consummated upon the water; the fact that it was done upon the ship is in itself insufficient 547

MARITIME LIEN

For damages caused by collision, takes precedence of liens for repairs and supplies 133

STEAM DREDGE

Is a subject of admiralty jurisdiction 133

WAGES

Lien for, is not lost by an authorized suit brought on behalf of the employee by the master of the vessel 547

AGENCY.

AUTHORITY TO SELL

Does not imply authority to collect the price of the goods sold . . . 69

COMMISSIONS.

Real estate agent is not entitled to a commission upon a sale made by the owner to a purchaser not procured by him, unless he has been given the exclusive right to sell 133

But where, by the agent's exertion, the owner and purchaser are brought together, and the sale is subsequently made without his intervention, the agent is entitled to a commission 202

Cannot recover on a *quantum meruit* under a contract to make him sole agent to sell on commission to be in full for any service rendered 551

ILLEGAL CONTRACT.

Advances made by an agent in effecting a combination for a purpose

AGENCY—(continued.)

which is unlawful and against public policy, cannot be recovered back from the principal 202

ANIMALS.**OWNER**

Of dog, which he looses for his own advantage, is responsible for injuries done by it to passers on the public street 202
Liability of, for injuries by vicious dog 26

POSSESSION

Of cattle running at large on a range, which is common pasturage, is constructively in the person holding the title 69

APPEAL. See LEGAL HOLIDAYS, ERROR AND APPEAL.**HABEAS CORPUS.**

The Supreme Court of the United States must, upon an appeal from the action of a circuit court, examine the evidence taken in the latter court to sustain or defeat the petitioner's right to his discharge under writ of 658

APPEARANCE. See LEGAL HOLIDAYS.**ATTORNEY-AT-LAW.****DISBARMENT**

Should be decreed because of an act by an attorney, whether in the discharge of the duties of his office or not, which shows such a want of professional or personal honesty, as renders him unworthy of public confidence 202

BAILMENTS.**DEPOSIT ON STORAGE**

Of grain is a bailment, although under the agreement of deposit other grain may be substituted for that actually deposited 267

BALLOT BOX. See ELECTIONS.**BANKS AND BANKING.****ACCEPTANCE**

Of draft may be made by a telegram promising to pay 548

ALTERATION.

Addendum to note, making the amount of interest greater than the legal rate, is material and will discharge a surety who did not sign it 621

BANKER

Includes, for purposes of taxation, one whose business is buying and selling stocks for his customers, and who employs capital in his business and has a regular place for transacting it 202

CHECK

Must be accepted before suit can be maintained against the bank, but an acceptance may be implied from the bank's charging it up to the account of the drawer 331

COLLATERALS.

Deposit of, with a bank, as security for loans, does not render the bank a gratuitous bailee, but it is liable for the want of ordinary and reasonable care in the custody of such collaterals 331

COLLECTION.

A bank receiving a draft for collection impliedly undertakes to perform such duties as are necessary for the protection of the customer 634

The principles of the law of principal and agent applied to a bank undertaking to collect 634

The question of such liability and cases thereon, considered . 637-657

The contrary doctrine that where such bank has forwarded the paper,

BANKS AND BANKING—(continued.)

and placed it in the hands of responsible agents, it is relieved from responsibility, stated 637-657

Difference between paper received for collection, and for transmission for collection 640

COLLECTION OF CHECK

By draft of the paying bank, which is dishonored when presented, but which the depositor subsequently directs the collecting bank to hold a few days and then send to him, does not render the bank liable for its negligence taking the draft instead of cash 267

EXEMPTION OF NATIONAL BANK

From suit in a State court, may be waived by the bank 69

FORGED CHECK.

Money paid upon, to an innocent holder, cannot be recovered back by the bank on which such check was drawn 331, 405

INDORSEMENT.

Restrictive, on draft left for collection, notice that the bank is merely agent to collect 792

LIABILITY FOR PUBLIC MONEY.

Depository of public money cannot be held responsible for payments made by order of a committee having official charge of the fund . 267

PRESIDENT

Of bank is not such a trustee as to give a court of equity jurisdiction over him for the misappropriation of the bank's funds 202

Knowledge by, of equities affecting notes offered by him for discount is not imputable to the bank 331

BEHRING SEA.

American rights in 625

BIBLE. See CHRISTIANITY.

BILLS AND NOTES

ALTERATION

By joint maker, without the consent of the other joint maker, will, if material, render the note void as to the latter 133

ATTORNEY'S FEE

When stipulated for in a promissory note, may be recovered without proof of the value of the services rendered 331

BLANK

For name of payee, may be filled in by any *bona fide* holder of the note within a reasonable time after it comes into his possession . 202

BONA FIDE HOLDER.

Purchaser of a note, who has knowledge that it was given in a speculative wheat deal, is not a *bona fide* holder for value 133

CONTRIBUTION

Cannot be expected from co-sureties by a surety on a promissory note, which has been renewed by a note signed by the principal and last-mentioned surety only 331

CORPORATION NOTE.

Authority of the president of a corporation to indorse a promissory note in its name, may be found from the surrounding circumstances 267

DELIVERY

Of note deposited with a bank to await performance of a condition, cannot be made until the condition is fulfilled 547

HOLDER.

Purchaser of a promissory note payable to the order of —, who fills his own name therein, is a subsequent holder within the Act of Congress of March 3, 1887, as amended by that of August 13, 1888 . 792

INDORSEMENT

Is constituted by a guaranty of payment and waiver of demand and notice, written upon the back of a promissory note 267

BILLS AND NOTES—(continued.)**INDORSER**

May maintain an action against the maker of a note, which he has taken up, notwithstanding the fact that there was no proper demand or notice of non-payment 69

Nor is he precluded from recovering from the maker by the fact that he paid the original note, not in cash, but by the substitution of a new note of his own 69

Of a note payable to the maker's own order, is liable thereon, although his indorsement is made prior to that of the maker . . . 405

Who has voluntarily paid a note from which he was discharged by the negligence of the bank which held it for collection, cannot recover back from the bank the amount so paid 203

Request by, that the holder will extend the time of payment of a note, constitutes a waiver of demand and notice 203

LEX LOCI.

A note made in one State, and payable in another, is governed by the laws of the latter 203

PAYMENT

Of a note made payable at the convenience of the maker, must be made within a reasonable time 203

Time of, may be controlled by a separate written agreement . . . 268

POSSESSION

By widow of an unindorsed note in the name of her husband does not establish her ownership in the note 331

SALE

Of drafts by one to whom they have been indorsed in blank for collection, vests a good title in the purchaser 331

BILLS OF LADING. See COMMON CARRIERS, FIRE INSURANCE.**CHARITABLE INSTITUTIONS.**

Liability of, for negligence 209

The effect of the motive of a founder 209

The rule, *Respondet superior* 213

CHattel MORTGAGES.**ACCOMMODATION INDORSER**

May be protected by a chattel mortgage given by the maker, and such mortgage will inure to the benefit of the holder of the note . 405

MORTGAGEE

May purchase at his own sale, but the burden is on him to show the fairness of the sale 69

Is not required to deliver to the mortgagor on his own premises, goods which he has taken into his possession after a default, but which have subsequently been redeemed 133

RETENTION OF POSSESSION

By mortgagor of a stock of goods, with the understanding that he shall continue to sell them at retail in the ordinary course of trade, renders the mortgage fraudulent and void as to his creditors . . . 268

CHECKS. See BANKS AND BANKING.**CERTIFICATION**

Is not constituted by a verbal statement that a check is good and will be paid. 133

CHRISTIANITY.**CHRISTIANITY AND THE COMMON LAW.**

Part of the common law in England 273

This statement excepted to by Lord Coleridge 276

In the United States, same maxim asserted in some cases . . . 277

Repudiated by the State governments 277

The question considered in

Arkansas 284

CHRISTIANITY—(continued.)

Delaware	283
Louisiana	278
Massachusetts	283
Missouri	284
New York	278-280
North Carolina	284
Ohio	278
Pennsylvania	280
South Carolina	284
Dr. Wharton's doctrine	284

PUBLIC SCHOOLS.

The adoption of, and reading any portion of the Bible in, is in violation of the Constitution of Wisconsin	286
The meaning of the word "sectarian" as used in the Wisconsin Constitution	286
The meaning of the term "sectarian instruction" in the Wisconsin Constitution	286
Reading from the Bible without comment is instruction	286
The stated reading of the Bible in, is "worship" within the constitutional prohibition	286
School room a place of worship	286
Religion as a system, cannot be taught in the common schools of Wisconsin	286
Morality and good conduct may be inculcated	286
The function of the State in relation to religion under the constitutional government, and the constitutional aspect of the Bible in the public schools considered	321-330

COMMON CARRIERS. See FIRE INSURANCE, INTERSTATE COMMERCE, RAILROADS.**BILL OF LADING**

Stipulation in, for an agreed valuation to cover loss or damage from any cause whatever, does not relieve the carrier from loss by his own negligence	766
Full value may be recovered	766
The doctrine discussed, and the decisions and laws of the various States in the Union collected	771-792

CATTLE.

Condition of, at the time of shipment must be looked to, in action for damages	548
Duty of carrier to feed and water does not arise when there is a special contract	548
Effect of a special contract	548

CONTRACTS AGAINST PUBLIC POLICY.

Agreement between rival steamboat owners to cease competition is void and will not be enforced	203
Release by a shipper of a common carrier from all loss or damage to goods in course of transportation, is void	203
Fire clause in a bill of lading, which exempts from liability for loss by fire a railroad company that has made no reduction in its freight rates in consideration of such clause, is void	268
But a clause limiting liability in consideration of a reduced rate of transportation, to a certain specified amount, in case of loss or damage through the negligence of the shipper, is invalid	268
Otherwise in Pennsylvania	405

DELIVERY TO WAREHOUSEMAN

Terminates the liability of the carrier	405
---	-----

FARE.

Bound to receive payment in legal tender notes from passenger on the train	195
Cannot refuse to accept such, and eject passenger	195

COMMON CARRIERS—(continued.)

Action for damages lies for such ejection 195

INSURANCE.

Insurable interest of common carrier 41

LIMITATION OF LIABILITY. See **BILL OF LADING.**

MOB.

Destruction by, of goods in the custody of a common carrier, render the latter liable, in the absence of any contract limiting liability . 203

PASSENGERS.

Rules and regulations for carriage of passengers, must be reasonable 191

Carrier must deal in a reasonable manner with 191

Boarding train without first paying fare, establishes the position of debtor and creditor 195

Unable to find ticket, must be allowed reasonable time to search for same 197

Entitled to reasonable time to borrow money to pay 197

Allowed reasonable time to look for coin lost in the car, before being ejected 198

Extra charge for packages too large to carry on the lap of passenger 199

Intoxicated, expulsion of 199-200

Sick passenger 199

Passenger stricken with apoplexy 200

On a free pass 386, 391-404

PASSENGERS' BAGGAGE.

Ladies' jewelry carried, by a man traveling alone, for transportation is not 548

PERISHABLE GOODS.

Butter received in summer for shipment South, must be shipped in such manner as to prevent injury by heat 332

TENDER

Of five dollar gold piece, or legal tender note, not unreasonable. . 191

Conductor must be supplied with sufficient change 191

Distinction between railroads and street railways, as to reasonable tender 191

Of coins worn smooth by use 195

Of passenger's fare by third person valid 197

COMMON LAW. See **CHRISTIANITY.**

CONFISCATION.

Of real estate as enemy property, by proceedings *in rem*, under Act of 1862, puts the fee in abeyance 118

Proceedings *in rem*, against enemy property, are personal for punishment 118

If owner pardoned, as a personal offender, fee reverts in him . . 118

Proceedings *in rem* treated as *in personam* 128

Children of offender can recover 128

Proceedings and cases under the Act of Congress 128-132

CONGRESS. See **INTERSTATE COMMERCE.**

CONSTITUTIONAL LAW. See **HABEAS CORPUS, INTERSTATE COMMERCE.**

Theories of the time when the transformation occurs from a Territory of the United States into a State of the Union 241

The question as to when the constitutional provisions become the Supreme law and override previous constitutions and laws, considered 242

Duty of the Supreme Court on appeal from the action of a Circuit Court upon a writ of *habeas corpus* 658

CONVENTION.

Power of, is limited by the people 239

CONSTITUTIONAL LAW—(continued.)

The right to limit the powers of delegates to Constitutional Conventions, is the same as that to limit the power of Representatives in the Legislature 239

The case of *State of Montana ex rel., Thompson v. Kenney* distinguished from the Pennsylvania Case 240

DUE PROCESS OF LAW.

Trial and commitment of one already tried and acquitted, is depriving him of his liberty without 793

MARSHAL.

Any duty of a Deputy United States Marshal, which is fairly inferable from his office, when legally performed, is an act done in pursuance of a law of the United States, and entitles him to release from arrest by State authorities, performance charging the act to be a crime . 658

When powers of a Deputy United States Marshal are those of a peace officer 658

United States Marshals are ministerial officers, and part of the executive department of the government, with duties beyond those specially prescribed by acts of Congress, and arising from the Constitution itself. 586

ORDINANCE OF A CONSTITUTIONAL CONVENTION

Convenient method of separating temporary provisions from the body of the proposed Constitution 223

The force of such ordinance 223

The true function of, accompanying a proposed Constitution submitted for the approval of the voters, considered 240

POLICE POWER.

Meaning of the phrase 411

Sic utere tuo ut alienum non laedas. 413

PRESIDENT.

Authority of to protect the Judges of the United States Courts in the discharge of their duty. 658

The Department of Justice is the proper one to direct the means of protection in the use of the civil power 658

SPECIAL LEGISLATION.

Act prescribing a method of appointing municipal offices, whose provisions are limited to such cities as shall accept it at a popular election, is not special or local legislation. 268

STATE COURTS

May enjoin a citizen of the State from prosecuting suits begun in another State for the purpose of evading the laws of his own State . 268

TAXATION

Cannot be levied by a State on the rolling stock of a foreign corporation, which is used in interstate commerce. 622

CONTRACT.**AFFIRMANCE.**

Any act of ratification after knowledge of facts sufficient to rescind for fraud, is an 549

MISTAKE.

Palpable error in a Government contract, through the failure to strike out a word in the printed form and insert another in its stead, will be corrected by the Court 204

PUBLIC POLICY

Forbids the organization of an association for the purpose of increasing the price or decreasing the production of a commodity in general use 719

RESTRAINT OF TRADE.

Agreement to sell an article to no one in the State except the other party to the contract, and to constitute him the exclusive agent for its sale, is not void 332

Nor is an agreement not to teach the French or German language

CONTRACT—(continued.)

within a designated State for a specified time unless it plainly appears that the restriction is greater than the necessity 406

THIRD PARTIES.

The consideration of a contract between two parties for the benefit of a third party is the consideration for the promise of the third party 592

Privity in contracts for the benefit of a third person is the same as that between the promisor and the promisee 592

May bring action thereon in his own name 592

The question as to the right of a third party to sue in his own name upon a contract made for his benefit discussed, and the cases in the different States thereon considered and collected 596-621

COPYRIGHT.**INFRINGEMENT.**

Where two pictures are dissimilar, the variations being more than colorable, there is no 793

CORPORATIONS. See MUNICIPAL, NATURAL GAS CORPORATIONS.**CONVEYANCE TO FOREIGN CORPORATION**

Is not rendered void by its failure to comply with the statutory conditions entitling it to do business in the State 134

FORFEITURE

Of corporate rights can be taken advantage of only by the sovereign power which granted the franchise 204

INTERNAL IMPROVEMENT.

Corporations constructed to lay out, and construct or cause to be laid out and constructed and maintained a line of piping for transporting petroleum, or other oils, are engaged in internal improvements . . 102

LIABILITY FOR STOCK TRANSFER.

A corporation cannot be held liable for the fraudulent misappropriation of stock by one who secures a transfer to himself by a properly executed power of attorney 70

MANAGERS OF SAVINGS BANK

Must exercise such oversight of the actions of officers and committees appointed by them as a reasonably prudent man would exercise in his own business 204

MINORITY STOCKHOLDERS.

Rights of, cannot be sacrificed by the majority after the expiration of the charter, through a sale of the corporation property made without their consent 204

MISAPPROPRIATION OF FUNDS

Of a corporation, when constituted 69

POWER OF CONFERRING DEGREES.

Degree of Doctor of Medicine cannot be conferred by a corporation chartered for "literary and scientific" purposes 406

STOCKHOLDERS' LIST

Cannot be copied by a stockholder for the purpose of securing aid in bringing a suit against the corporation 406

UNPAID STOCK INSTALLMENTS

Do not, in the absence of a special contract, give the corporation a lien upon the stock for the amount unpaid 332

COSTS.**TAXATION.**

The costs of printing the bill and pleadings in a suit in the Circuit Court of the U. S. cannot be taxed 793

COURT. See LEGAL HOLIDAYS.**CRIMINAL LAW. SEE FORGERY.****CONFESSION**

Made before the coroner by a person under arrest for murder, who

CRIMINAL LAW—(continued.)

had been instructed as to his rights, is voluntary and may be given in evidence against him 622

JURY.

Discharge of the, by the judge on account of his own ill health, on an adjourned hearing, without the prisoner's consent, is equal to an acquittal of the prisoner 793

LARCENY

By broker, what constitutes 332

PARDON

Upon conditions which are afterwards broken, will authorize the convict's recommitment to the penitentiary, even though his original term has expired 204

CUSTOM DUTIES.**AD VALOREM.**

Gun blocks planed on two sides are subject to 549
Rough hewn or sawed gun blocks only fall within classification of "manufactures of wood not specially provided for." 549

DAMAGES.**EXPECTED PROFITS**

Are not a proper element of damages in an action for false representations 70

LIQUIDATED DAMAGES

Will be changed into a penalty by the waiver of complete, and the acceptance of part performance, of an entire contract 70

MEASURE OF DAMAGES

To be recovered under an oil lease, with covenant, "to continue, with due diligence and without delay, to prosecute the business to success or abandonment; and if successful, to prosecute the same without interruption, for the common benefit of the parties." 111

Under action for account, where oil has been taken by lessee under a lease for boring for salt wells and manufacturing salt, is the value of the oil at the instant it separated from the land 112

Under a lease of oil lands, reserving no rent or term, whereby the lessee is to sink a well of a certain depth in a given time with right of entry by the lessor in case of breach, the latter can only recover nominal damages, not what it would cost to sink the well . . . 113

Measure of damages on a contract to dig an oil or gas well. . . . 115

DAYS OF PUBLIC REST. See LEGAL HOLIDAYS.**DEBTOR AND CREDITOR.****PAYMENT**

By check is conditional only and defeasible on the dishonor of the check 204

Acceptance of the note of a third party for a pre-existing debt, and the surrender of the original notes which represented the debt, will discharge the original debtor 268

DECEIT.**FALSE REPRESENTATIONS**

As to stock of corporation which is given in exchange for other stock, will sustain an action of deceit, although diligent inquiry has not been made as to the truth or falsity of such representations . . . 719

DEEDS.**DELIVERY**

After death of grantor conveys no title 720

INSANITY OF GRANTOR

Does not affect the title to real estate of a purchaser for value who buys from the grantee of the lunatic without notice 204

SURVIVORSHIP.

Conveyance to a man and his wife. and the survivor, gives each an

DEEDS—(continued.)

estate for life, with remainder in fee to the survivor, in Illinois . . . 622

UNDUE INFLUENCE

Sufficient to warrant the setting aside of a conveyance is shown, where a father, under threats from his daughter and her husband, procures from his natural daughter a re-conveyance of property he has previously conveyed to her as a provision, such daughter acting without advice . . . 622

The fact of a favorite son, who has remained at home and managed his father's farm for years, obtaining a conveyance from the father, under threats of leaving home, the latter being sound in mind, and acting with freedom of will, does not constitute . . . 720

WARRANTY.

Habendum, "as a good and indefeasible estate in fee-simple," does not constitute a covenant of warranty . . . 720

Nor does the word "grant," when used alone, constitute a . . . 720

DENTISTS

May be required by statute to obtain from a State board of examiners a certificate as a pre-requisite to continuing practice . . . 134

DEPOT COMPANY.

Liable for torts committed upon railroad passengers by an employee of vicious temper . . . 22

Duty of the proprietor, owner or controller of a place open to the public discussed, and the principles relating thereto examined . . . 24-31

Difference between liability of the owner of a vicious dog, and the doctrine as applied to human beings, lies in the fact that at common law *scienter* must be alleged and proved in action for damages by vicious dog . . . 26

DIVORCE.**CRUEL TREATMENT**

By a husband is not excused by the fact that it is the result of habitual intoxication . . . 332

DRUNKENNESS

Does not include, so as to constitute a cause for divorce, the excessive use of morphine by hypodermic injections . . . 332

DRUMMERS' TAX. See INTERSTATE COMMERCE.**EASEMENTS.**

Defined as a right without profit, in the land of another . . . 73

A profit *a prendre*, is a right to take or sever something valuable from the land of another . . . 73

Distinguished from profits *a prendre*, on the ground that they are merely rights to use without profit . . . 73

Requisites to, are a dominant and servient tenement . . . 73

Benefit must be private, irrevocable, and unattended with direct tangible profit . . . 73

Burden must be imposed upon corporeal property, not the owner, and be either positively, or consequentially, injurious to its enjoyment . . . 73

Incident to, are the right of the owner of the servient tenement to use the *locus in quo*, in every respect not interfering with the easement, and the duty of the owner of the dominant tenement to repair and amend . . . 73, 74

Acquired by grant, prescription, and by implication of law . . . 74

The distinction between legal and equitable, created by covenant or reservation, not always observed . . . 74

To create an easement at law, sufficient if the intention to grant be manifest . . . 74

CREATION OF EQUITABLE.

By covenant or reservation . . . 76-81

By parol agreement . . . 81-82

EASEMENTS—(continued.)**ENFORCEMENT OF EQUITABLE.**

- The restriction of the use of the property must not amount to a general restraint of trade 83
- Equity will not enforce a covenant where a material change has been caused in the property 83
- Nor where it would be oppressive to give effect to the covenant owing to the altered circumstances 83
- The question considered, in cases where the complainant has himself altered the condition of the property; where he has permitted breaches by other covenantors; and where the change is referable to the acts of others 83-87
- The restriction must be intended to benefit the property, and not be a personal advantage of the original covenantor 87
- Equitable remedies considered 90-92

EQUITABLE.

- Defined as a right without profit which the owner of land has acquired by contract, or estoppel, to restrict, or regulate, for the benefit of his own property, the use and enjoyment of the land of another . . . 75
- Scope of not easily defined, but they either prohibit or regulate the erection of buildings, or prescribe the purposes for which real property shall or shall not be used 75

STAIRWAY.

- Under what circumstances premises may be subject to an easement in a stairway 269

EJECTION.**FEDERAL COURTS.**

- Ejection can only be had in the, upon the strict legal title . . 549
- The fact that a party holds a State certificate of purchase of land, though such is *prima facie* evidence of title, does not alter the case 549

ELECTIONS.**CONDUCT OF.**

- In Pennsylvania, an Ordinance of a Constitutional Convention cannot contravene the law calling the Convention 239

CONGRESS.

- Doctrine that Congress can enforce State election laws with the same effect as Statutes of the United States is constitutional 367

CONSTITUTION.

- When the, defines how a right may be exercised, it prohibits the exercise of that right in some other way 839
- The first Article of the, and amendments as affecting elections, considered 338-343
- The second Article of the Constitution, considered 343

COURTS, JURISDICTION OF.

- The Federal Courts have exclusive jurisdiction over contests for seats in the House of Representatives 375

INTIMIDATION.

- The general crime of intimidation of voters, considered 347
- Intimidation of voters for electors of President and Vice President or for Representatives in Congress, considered 360

OFFENCES AGAINST THE BALLOT BOX.

- Federal Courts have jurisdiction to punish, at Congressional elections 337
- No jurisdiction in other elections 337
- Exceptions in case of discrimination on account of race, color or other condition of servitude 337
- A person offering to vote, not liable to arrest under State or National law for any cause relating to his right of suffrage 371

OFFICERS OF ELECTIONS.

- The phrase "officers of an election," examined 360

ELECTIONS—(continued.)

Duties devolving upon officers of elections, they owe to the United States as well as to the State 364

REGISTRATION.

Laws must be uniform, impartial and reasonable 839
 Legislature has no power to require a voter to possess qualifications not required by the Constitution 839
 A Statute requiring absent voter, or one who has gone into another State with the intention of voting therein, to register ninety days before election a notice of his intention to become a qualified elector; or requiring him to produce a certificate that his name has continuously been on the tax duplicate receipt, and that he is still a tax payer, in case of his absence on State or United States business, is unconstitutional 839
 The failure of the State Legislature to pass a registration law, as provided by the State Constitution, has no effect upon the right to vote 839
 Registration is a qualification if the Constitution so defines . . . 839
 One voter cannot be required to register while another is exempt therefrom 839
 The Constitutional provisions of the several States and Territories relation to the right of suffrage, and the registration of voters, collected and examined 872-920

RESULT OF

An election, declared by a legally constituted canvassing board, is given credit to by the Courts, until set aside by a tribunal of competent jurisdiction 223

REVISED STATUTES.

The provisions of the United States Statutes relating to offences against the ballot box, and their nature, considered and examined 346-349
 The Statutes especially relating to suffrage considered 349-360
 Divided into two classes; those relating to Federal elections, and those protecting the exercise of the suffrage generally 349
 Whether the rule, that penal statutes are to be construed strictly, has any application to State and Federal laws regulating elections. *Quere* 372
 State laws not altered by, are adopted by Congress 364

RIGHT TO VOTE.

The general doctrine held by the Courts as to the right to vote is that the right depends upon State laws 344
 Not granted or guaranteed to the citizens by the Constitution of the United States 344
 Justice MILLER's opinion, *contra* 344
 The Fifteenth Amendment confers the right to vote upon no one . 345
 Effect of the Constitution and the Fourteenth Amendment was not to make all citizens voters. 345
 A provision in a State Constitution limiting the right to male citizens does not violate the Federal Constitution 345

SUPERVISORS.

Revised Statutes referring to the appointment of supervisors, and special deputy marshals, and for holding sessions of the United States Circuit Courts 363

EMINENT DOMAIN. See NATURAL GAS CORPORATIONS.**ASSESSMENT OF DAMAGES**

Must be provided for in a statute which confers upon a municipality the power to open streets through private property 70

MUNICIPAL CORPORATION

Cannot take private property for a public use, unless its charter expressly gives it that power 70

ERROR AND APPEAL. See APPEAL.

RECORD.

- Failure to file, by the time prescribed, renders an appeal inoperative 547
- But such failure is not a bar to another appeal within the time allowed by law 547
- Filing the transcript of the record alone, if in time, is sufficient to give the Supreme Court of the United States jurisdiction of an appeal 547

EVIDENCE.

ADMISSIBILITY.

- Knowledge of the profits of a business and of the books is admissible on a contract to receive half the profits, where the books are not the only evidence of profit 549

ANCIENT DOCUMENTS.

- Deed more than thirty years old and coming from the proper custody, under which title has long been asserted, is admissible in evidence without the production of a power of attorney by whose authority, according to its recitals, it was executed 406

BURDEN OF PROOF.

- Alteration of check, apparent upon its face, imposes upon the holder the burden of showing how such alteration was made, although both the drawer and payee of the check are dead 406

COMPETENCY.

- Witness not a party to a suit against executors, competent to give evidence as to transactions between testator and himself, though interested in the result 796

PRIVILEGED COMMUNICATIONS.

- Communications to a law student, employed by a party to litigation to advise and assist him in his suit, are not privileged 206

EXECUTION.

DEATH OF DEBTOR.

- Pending a levy from a Federal Court, confers no jurisdiction upon the State Courts to administer the property levied on 205

STAY.

- A Federal Circuit Court may grant a temporary stay, on its own judgment 550

EXECUTOR. See PARTNERSHIP.

FIRE INSURANCE.

ACTION

- Lies against a company for loss by fire where it has brought action before, and recovered its premiums after a fire has occurred, even though the policy contains a note for cessation thereof, &c 793

ARBITRATION CLAUSE.

- Making an arbitration a condition precedent to bringing suit, applies where there has been a total loss 406

ASSIGNMENT OF POLICY.

- Nontransfer of a policy of insurance on a sale of the property cannot be set up by an insurance company as a defense, where a prior assignment upon a mortgage of the property has been endorsed on the policy by the agent and approved of by the company and an assertion made that no further transfer was necessary 332-333

BILL OF LADING.

- Giving the carrier the benefit of insurance is valid 31
- But the insured forfeits all rights under a policy containing a warranty that the insurance shall not inure to the benefit of any carrier 31
- Carrier cannot acquire any rights under such policy 31
- Effect of stipulation that the carrier shall have the benefit of the owner's insurance, considered 44-47

FIRE INSURANCE—(continued.)**BY-LAWS**

Of a mutual fire insurance company are binding on a member who receives a copy of them and makes no objection 333

CONDITION.

Oil drawn at dark near a lighted lamp, is within a condition making policy void if inflammable materials are kept, except certain oils, if drawn and filled during the day 549

INCREASE OF RISK

Is occasioned by a mortgage placed upon the insured property, although no right of action has accrued upon it 269

INSURABLE INTEREST.

In Indiana a husband has no insurable interest in his wife's separate property 205

Warehousemen have an, in cotton insured by them in their own name, and can recover, although the cotton was owned by another and such fact was not disclosed 794

LIABILITY.

Upon a policy covering twenty-one different pieces of property, insuring each for one-twentieth of its value, fixing the liability at such "proportion of any loss as the sum insured bears to the whole sum insured" will be fixed at one-twentieth of the total loss sustained . 622

MILL OR MANUFACTORY

Does not necessarily stand idle because its machinery is not running 622

NOTICE OF LOSS.

A request by the insured to the agent that the latter should give notice of loss, the agent replying that he had already given notice, in consequence of which no further notice was given, is a sufficient notice, although not given on behalf of the insured 134

PROOFS OF LOSS.

Wilful false statement in a proof of loss as to some pretended losses, will forfeit the entire policy, even though the actual loss exceeds the total amount of the policy 333

SUBROGATION.

The insurer's right to, considered 42-44

TRANSFER OF TITLE

By a husband through a third party to his wife of his interest in property held by them jointly, is such a change in the title as will avoid a policy insuring such property in their joint names . . . 205

Partial transfer of insured property, in which the policy holder retains an insurable interest, will not prevent recovery on the policy for a subsequent loss 269

Giving possession to a lessee, under a contract to purchase the property upon the termination of this lease, or, at his option, at any time during its continuance, is such a change of title as will render a policy upon the property void, if the transfer is not approved by the insurer 333

VACANT OR UNOCCUPIED.

Insurer is bound by a construction placed upon the words "vacant and unoccupied" by its agent, upon which the insurer has acted . 406

Factory vacated by its tenants, the key being given up to the owner's renting agents, who visit it occasionally, is 622

WAIVER.

Delivery by an agent of the company of a policy in which the fact known to such agent, that the insured building stands on leased ground is not noted in writing, constitutes a waiver of a condition requiring it to be so noted 269

May be made by a general agent of an insurance company, by parol, notwithstanding a condition in the policy that a waiver shall be void unless in writing and endorsed thereon 720

FIRE INSURANCE—(continued.)

WARRANTY.

In a fire policy that insurance shall not inure to the benefit of any carrier is not against public policy, or in restraint of trade 31
Effect of such warranty considered and the cases thereon examined 47-49

FIXTURES.

MORTGAGEE.

To establish claim for fixtures, must show that the chattels are actually annexed, or are appurtenant to the realty; that they were applied to the uses to which that part of the realty with which they are connected was appropriated; and that they were annexed with the intention of being made a permanent accession to the freehold . . 270

RAILROAD CARS

Used in a quarry, are not fixtures 270

FOREIGN JUDGMENT.

In the absence of fraud is conclusive, if rendered by a court of competent jurisdiction, in the absence of the defendant, his counsel being present 550

FORGERY.

The Microscope and the Camera in the detection of 553
Photographs of signatures in the Jerome Will case 553, 560-1
The Howland Will case 562
Signatures in 570
A letter falsely purporting to come from the owner of a diploma requesting the custodian to deliver the diploma to bearer constitutes 134
A State Court can try the officers of a national bank for forgery of notes made to deceive the U. S. bank examiner 71

FRAUDULENT CONVEYANCE.

Conveyance by husband to wife presumedly for a debt due to her, but really to protect the property from creditors is void 793

MORTGAGE.

By a partner of his own property to carry on the firm's business is not a fraudulent conveyance 550

NOTICE.

The purchaser must have actual or constructive notice of the vendor's condition 550

GIFT.

CHARITABLE.

Validity of, for educating two persons for the ministry not affected by condition subsequent 548

INTER VIVOS.

Receipt in full for a bond given by a daughter to her father, which is found among his papers after his death, does not discharge the debt, there having been no delivery 70
Bill of sale of a life insurance policy, made out to the niece of the insured and given to the insured's attorney, with instructions to deliver it to the niece in case of his death, is not a valid gift *inter vivos*, but may be sustained as a gift *causa mortis*. 270
Deposit of money in a saving's bank by a father to the credit of his infant son, who died sixteen years after his majority without knowledge of such deposit, the father retaining possession of the deposit book, does not constitute a gift to the son 270

GUARDIAN AND WARD.

ACCOUNT.

Compound interest may be charged, where the guardian collects and uses the ward's money, and does not attempt to account until compelled 550

HABEAS CORPUS. See CONSTITUTIONAL LAW, APPEAL.**INTERSTATE COMMERCE.**

Agent imprisoned for selling liquor in small original packages will be released on 794

UNITED STATES MARSHAL.

A Deputy United States Marshal who kills a person assaulting a Circuit Judge while traveling his Circuit, is entitled to a writ of *habeas corpus*, when arrested by the State officials under a charge of murder 658

HUSBAND AND WIFE.**TAKES ON WIFE'S SEPARATE ESTATE**

Do not constitute a personal liability of the husband, although the property may be occupied by both as a homestead 71

INFANTS.**NEGLIGENCE**

May be attributed to a child seven years of age, but the negligence of its parents cannot be imputed to the child 623

INDICTMENT. See INTERSTATE COMMERCE.**INNKEEPERS.** See SLEEPING CAR COMPANIES.**LIABILITY.**

The fact that a hotel porter in charge of an omnibus at a depot, is not authorized to receive baggage or checks therefor from guests at the depot, does not relieve the hotel proprietors from liability for baggage lost by a third party, to whom the porter handed the check . . . 205

The question, who is an innkeeper, considered 257-259

He is one who keeps a house for the lodging and entertainment of the public generally, as a means of livelihood 258

Duties and liabilities of innkeepers considered and contrasted with those of a sleeping car company 259

INJUNCTION.**FRANCHISE.**

Will not be granted where defendants are making use of franchise conferred upon them by the State, in the absence of negligence and wanton disregard for the rights of others 550

JUDGMENT.

Negligence of attorney is not sufficient ground for grant of injunction to restrain a judgment 550

INTERSTATE COMMERCE.**BRIDGES.**

Congress may authorize, over navigable streams of the Union . . 474

Even after a decree for an abatement as an obstruction to navigation 477

States have entire control over internal waters, and the erection of bridges 483, 745, 800, 823

But Congress may authorize a bridge over such waters, if it form a means of Interstate Commerce 483

When the waterway lies between two or more States, and requires general regulation, Congress alone can authorize bridges . . . 483

CATTLE.

City ordinance requiring animals to be inspected before slaughtering and to be slaughtered within one mile of the city limits, is void . 133

All cattle coming from another State cannot be excluded under State laws 801

Inspection of, such a short time before slaughter as to prevent the carriage of the carcasses from one State to another, is a case where interstate commerce can only exist under general laws passed by Congress, State legislation thereon is void 801, 807

COMMON CARRIER.

A State cannot impose a capitation tax on, for alien passengers . 460

INTERSTATE COMMERCE—(continued.)

- Not responsible for immigrants and interstate passengers 461
- A State cannot prevent transportation by, of merchandise and delivery to the consignee 824
- Cannot refuse to receive intoxicating liquors, because State law prohibits their carriage into its territory 824

CONGRESS

- Must deal equally with the commerce of different States . . . 424, 491
- Express restraints upon the States under section 10 of Article one of the Constitution of the United States 425
- The power of Congress to regulate commerce includes the control of navigation 428
- Congressional regulations of commerce must be general and not local 491, 748
- The admission of a State, or the ratification of a compact between two or more States, is not a regulation of commerce 474
- May legalize an interference with commercial intercourse . . . 474
- Congress can authorize the construction of bridges, dykes, and other structures for the assistance of commerce 475
- Has exclusive power over the importation of foreign merchandise . 439
- Subjects of the Constitutional power that are, in their nature, national, or admit only of one uniform system or plan of regulation, are exclusively in the power of Congress to regulate or not 453, 466
- Responsibility to permit State regulation is upon Congress . . . 491

CONSTITUTION.

- The construction of the Constitution should be influenced in cases of doubt, by the objects sought in the adoption of the instrument, and its declaration of supremacy within its own sphere 417
- A strict construction improper 418

CONSTITUTIONAL POWER

- To regulate commerce between the States is subject only to the limits prescribed by the Constitution itself 491
- Merchandise brought from another State is under the, exclusively, until it has been sold or disposed of, so as to mingle with the common mass of property in the State into which it has been brought 491
- Trans-shipment of freight destined to another State or nation does not so break up the carriage as to remove it from the Constitutional power into the domain of the State police power 743-747
- Cannot be defeated by the number of separate carriers, or similar details 743-747
- Extends over that commerce which, though carried on within a State is a part of interstate or foreign commerce 743-747

COURTS

- Are the proper organs of government to decide whether quarantine or other preventative police regulations extend beyond the danger apprehended, into regulation of interstate commerce 801-810

DEFINITIONS.

- Every species of commercial intercourse, as well as traffic . . . 427, 433
- Includes navigation and the transportation of passengers . . . 459
- Shipping merchandise from State to State 549
- Includes both outgoing and incoming commerce 748

DISTRICT OF COLUMBIA.

- Commerce between the States and the District of Columbia cannot be specially regulated under Congressional authority to any greater extent than that between the States 748

DRUMMERS.

- A State tax upon a drummer or person who sells by sample, catalogue or trade list, or upon one whose occupation consists in selling

INTERSTATE COMMERCE—(continued.)

goods, is a tax upon the goods and not a mere license to carry on the avocation 747

FISH.

Prohibition, by a territorial statute, of the exportation of fish from the territory, is void 332

FOREIGN GOODS.

The sales of, cannot be restricted further than their importations may be 439

IMMIGRATION.

A State cannot regulate, except to guard against disease or pauperism 459

IMPORTS AND EXPORTS.

Terms applicable to merchandise in trade with foreign nations and not from State to State 727

INJUNCTION.

The United States Courts will restrain an interference with commercial intercourse where it is a nuisance, or creates irreparable damage, notwithstanding the absence of Congressional action . . . 474

Will issue to restrain proceedings against agents of non-resident importers selling liquors in the original packages, where the State law is a violation of the interstate commerce clause of the Constitution 794

INSPECTION LAWS

Are not derived from any power to regulate commerce 813

Are derived from the right of every State to improve the quality of domestic articles before they enter into commerce, domestic, interstate or foreign 813

Are part of State Legislation embracing everything within the State's territory which has not been placed in the care and control of the United States Government 813

Legitimate, relate to the quality of the articles, or their form, &c., as ascertained by a public officer at any reasonable place fixed by law 813

Inequitable, but legitimate, can only be remedied by Congress and not by the Courts, when the States persist in enforcing them . . 813

Requiring tobacco casks to be weighed and measured at a particular place, before transportation out of the State, are legitimate, though no provisions are enacted as to tobacco transported from place to place within the State 813

LICENSE. See TELEGRAPH.

A coasting license under the laws of the United States, nullifies a State law requiring a State license for the use of steam to propel a vessel within a harbor of the State; it is issued under the commerce power of the Union 428, 721

A license granted under the taxing powers of the United States does not necessarily authorize the carrying on of the business, trade or manufacture licensed, thereby differing from a license under the commerce powers 721

An internal revenue license, obtained by a lottery ticket dealer or a retail liquor dealer, does not authorize sales of lottery tickets or liquor; the licensee has merely paid a tax to the United States . . 721

A steamboat navigating only within a State, must have the United States license, if she carries freight and passengers ultimately destined to another State or a foreign nation 743

The agent of a distant but interstate railroad may solicit passengers without paying a State license fee 748

State laws requiring a license to sell liquors brought from a foreign nation, or another State, were considered to be valid, but now they are declared to be void so far as respects their sale by the importer in the original package 453

INTERSTATE COMMERCE—(continued.)**Liquors.**

Liquor imported from another State for sale in the packages in which it has been shipped, cannot be seized under State laws, while in the possession of the consignee awaiting sale in the original packages . . . 491
 Ardent spirits, distilled liquors, ale and beer are the subjects of exchange, barter and traffic; that is, are subjects of commerce and not such articles as a State may subject to sanitary regulations, upon the plea of tending to spread disease, pestilence and pauperism . . . 491
 Liquor brought from another State may be taxed without discrimination, while in the original packages . . . 735
 It is discrimination to tax drummers or resident agents, selling liquors brought from another State, at a higher rate than domestic sellers . . . 735
 Original packages of fermented, distilled and other intoxicating liquors or liquids, are now subjected by Congress to the police power of the several States and Territories under the Wilson bill . . . 826

NAVIGATION.

A bridge over an interstate waterway, is not necessarily incompatible with navigation . . . 474
 Navigable waters of the United States are those used as a part of the means for interstate and foreign commerce . . . 743

ORIGINAL PACKAGE.

An original package is one which has been brought from another State or nation and not merely one which has paid a tax to the United States . . . 721
 The size of, is of no consequence . . . 794
 When an original package has been used or exchanged by the breaking up for use or retail sale, and also when it has been sold by the importer in its original condition, it loses its distinctive character of an import and becomes subject to the powers of the State . . . 439
 An original package is not broken and the law is not varied by selling liquors in the bottles in which they have been shipped from another State, although the bottles came packed in boxes and barrels, and were taken out and sold singly after their arrival . . . 483
Contra . . . 792
 Delivery of property to the consignee, subjects its ownership and sale in the original package, to the laws of the State where it is delivered . . . 483
 The sale of an original package is subject to the laws of the State, as the Congressional powers over interstate commerce terminate upon the delivery of the package within the State . . . 489
Contra . . . 491
 The sale of liquor in the original packages in which they are brought from another State, may be prohibited under the police powers of the place of sale . . . 490
Contra . . . 491

PILOTS.

State laws may regulate until they come into collision with an Act of Congress . . . 466

REGULATION OF.

The preference of the ports of one State over those of another is forbidden to Congress and not to the States, which are prevented by the commerce clause and not the ninth section of the First Article of the Constitution . . . 797
 The discrimination between States, and not individual ports, is forbidden to Congress, and therefore incidental advantages can be given to a port in the due exercise of the regulation of commerce . . . 797
 The power to regulate extends into the jurisdiction of the States until each instance of commercial intercourse with foreign nations and among the States has terminated . . . 425

INTERSTATE COMMERCE—(continued.)

The power to regulate among the States is granted in the same clause and by the same words, as that with foreign nations, and co-extensive with it 453

STATE LAWS. See POLICE POWER.

State laws affecting commerce are valid in the absence of Congressional legislation, and in the case of a subject not requiring a general regulation 445, 491

Such a subject is a dam or bridge interfering with commerce in a stream wholly within a State though flowing into an interstate body of water 445

Such laws are the exercise of the reserved police powers . . . 445

Interstate commerce, or the purchase, sale and exchange of commodities, requires a uniform system, and in the absence of Congressional action cannot be the subject of State laws 491

State authority may be exercised over subjects of interstate commerce only when a general regulation is not necessary or convenient, and Congress has not acted 491

The responsibility is upon Congress to permit State regulation of interstate traffic 491

A State may regulate its internal commerce, notwithstanding a condition of its admission into the Union, requiring freedom of the particular commerce afterwards regulated. Such condition operates only to prevent discrimination against the citizens of other States . 474

A State may proceed in the courts of the United States, to prevent or abate an obstruction to commercial intercourse growing out of State improvements 474

There is no State sovereignty which is exclusive of the constitutional regulation of commerce 474

STATE POWER.

Each State has authority over the business, trade and manufactures of its citizens, until its regulations conflict with the commerce or other constitutional powers of the United States 722

State may legislate for the safety, &c., of its inhabitants 448

Except when restrained by the Constitution 448

State may require report of passenger list from commander of vessel 448

TAXATION.

State taxation of commerce is subordinate to the Constitution of the United States 417

Imported merchandise, upon which duties have been paid, is not subject to State taxation while in the possession of the importer and in the original packages, though offered for sale 439

A tax upon the dealer is a tax upon the goods 439

Goods brought from another State may be taxed after their arrival and while in their original packages, because not imports; but there must be no injurious discrimination in tax in favor of home made articles 727

State may not tax interstate commerce or goods coming from another State because of their origin 728

State may not lay a stamp tax on bills of lading issued either for exports or merchandise consigned to a place in another State . . . 728

Of a non-resident measured by his stock in another State, or by his capacity to do business all over the United States and not merely within the taxing State, is invalid 747

A non-resident who opens a place of business and employs drummers in a State, cannot object to State taxes which are no greater than those imposed upon residents of the State; but there must be no discrimination 748

But non-resident dealers or their salesmen, maintaining no place of business in the State, cannot be taxed 748

INTERSTATE COMMERCE—(continued.)

- A tax imposed upon a non-resident drummer for the privilege of selling, is void 748
- A non-resident's exemption from State taxation is not a greater privilege than enjoyed by residents; the State has the power to tax residents, and in that way, the ability to prefer non-residents 748
- A State may not tax commerce among other States 748
- Pullman car business carried on within a State is taxable as a privilege 793
- State cannot collect expenses of maintaining paupers, or of exercising its police power by a tax on immigrants 460
- Auction sales of original packages of foreign origin not subject to . 810
- Otherwise where goods are produced in the Union 810
- A State may lay a general tax upon a kind of business, the subjects of which may enter into interstate and foreign commerce so long as that commerce is not made a matter of privilege 810
- Logs temporarily stopped by low water in their course through a State from one State to a third, cannot be taxed where they are stopped 821
- Property can be taxed where it is situated, though the owner is a resident of another State 821
- The products of a State may be taxed, though intended for removal to another State or country, until they are delivered to a common carrier or their ultimate passage from the State has begun 821

TELEGRAPH COMPANIES

- Cannot be taxed by a State upon messages between points within and points without such State 203

VOYAGE

- Not ended until the passengers and merchandise have been landed and disbursed in the State 459, 821

THE WILSON BILL

- 828

INTERSTATE COMMERCE ACT.

- Express company doing business as an independent concern for its own profit not within the 794
- Indictment must show that such company is a mere adjunct or bureau of a railroad, to come within the act 794
- Any statute conflicting with the Interstate Commerce Act is void . 549

INTERSTATE COMMERCE LAW. See RAILROADS.

UNJUST DISCRIMINATION

- Is not constituted by the refusal to transport stock in the cars of a certain live-stock transportation company at the same rate as in the cars of another such company, when the railroad has different contracts with the two companies and can use the cars of the latter to its own better advantage 134

JURORS.

- Mormons cannot be, in Idaho, where jurors must have all the qualifications prescribed for electors 333

JUDICIAL PROCEEDINGS. See LEGAL HOLIDAYS.

JUDGMENTS. See FOREIGN JUDGMENT.

CONFESSED JUDGMENT.

- Enforcement of, when entered without a substantial compliance with the statute authorizing such entry, may be enjoined at the suit of a third party prejudiced by such judgment 71

STAY.

- A temporary, of execution, may be granted by a Federal circuit court upon its own judgments 550

JURISDICTION. See CONSTITUTIONAL LAW, U. S. COURTS.

ALIEN

- Temporarily within the district, cannot be sued in the Federal courts by a citizen of the district 205

JURISDICTION—(continued.)**STATE AUTHORITIES**

Have, over United States Marshal, arrested while on his way to serve process of the United States Commission, when 794

LANDLORD AND TENANT.**DISTRESS**

May be made upon furniture leased to a tenant and used by him on the demised premises 407

FORFEITURE.

A waiver of, for non-payment of rent arises from disregard of the terms of payment 93

POSSESSION.

Where a lease for the purpose of drilling gas wells reserves the right to the lessor to till the soil, the lessor cannot, after the lessee has drilled a well, and has gas ready to flow into pipes by turning a valve, claim the lessee is not in possession, and must resort to a court of law to establish his title before a court of equity will interfere 93

A lease for sinking and operating gas wells, which stipulates "no wells to be drilled within 300 yards of the brick building" on the tract, releases the lessor's right to grant a lease of such land . . . 93

REDUCTION OF RENT

Reserved by a written lease, may be orally agreed on by the parties, 62?

LEGAL HOLIDAYS.**DEFINITION.**

Days set apart by public authority for religious, political or social purposes 141

EFFECT OF.

All actions not specially prohibited, may be performed as on ordinary days 141

Judicial proceedings generally valid upon 142

Ministerial acts generally valid 150

Similarly, notarial acts 152

Performance of contracts generally postponed to another day . . 153

School sessions are omitted upon the ground of conformity to custom where there are no statutory provisions 153

Detailed statement of effect upon negotiable paper 154

STATUTES OF THE STATES AND TERRITORIES.

Alabama	156	Mississippi	171
Arizona	156	Missouri	171
Arkansas	156	Montana	171
California	157	Nebraska	172
Colorado	158	Nevada	172
Connecticut	159	New Hampshire	174
Dakota	160	New Jersey	174
Delaware	161	New Mexico	174
District of Columbia	161	New York	174
Florida	162	North Carolina	176
Georgia	163	Ohio	177
Idaho	163	Oregon	177
Illinois	164	Pennsylvania	178
Indiana	164	Rhode Island	180
Iowa	165	South Carolina	181
Kansas	165	Tennessee	181
Kentucky	165	Texas	182
Louisiana	166	Vermont	182
Maine	166	Virginia	182
Maryland	167	Washington	183
Massachusetts	168	West Virginia	183
Michigan	169	Wisconsin	184
Minnesota	170	Wyoming	185
Summary of the Statutes			186

LEGAL HOLIDAYS—(continued.)**SUNDAYS.**

Improperly classed with, in certain States 190

LEGISLATURE.**COMPENSATION OF MEMBER.**

A member of the Legislative Assembly of Montana, whose compensation is fixed by law, when entitled to have the same audited and settled 223

This right enforceable by *mandamus* 223

LIBEL.**CARICATURE**

In a newspaper may be libelous *per se* 333

MERCANTILE AGENCY

Publication by reports issued and sent to its subscribers is not libelous *per se* 206

PER SE

Not sustained by a statement that the plaintiff was actuated by the stimulus of a certain compensation and not by patriotism or love of his guild 550

SIMILARITY OF NAME

Not conclusive that the person alleged to have been libeled was the subject of the libelous publication 333

LIFE INSURANCE.**ASSIGNMENT**

Of a life policy, absolute on its face, by a debtor to his creditor, passes no greater interest than such sum as will pay the debt, with interest, and reimburse the creditor for whatever premiums have been paid by him 333, 407

BENEFICIARY

Named in the certificate of a mutual benefit society may be changed at the will of the insured member, provided the change is made in the manner pointed out in the certificate and by-laws of the society . . . 270

Exceptions to this rule 270

INSANITY

Is such "sickness or other disability" as will entitle a member of a mutual benefit association to receive benefits 334

LIMITATION OF SUIT

Will not bar an action, where the beneficiary and the company's superintendent have agreed on the amount to be paid, and the latter has promised to pay it as soon as the money should be received from the home office 407

MUTUAL BENEFIT SOCIETY

Is subject to the same rules of law in the interpretation of its contracts as a mutual life insurance company 135

OTHER INSURANCE.

An insurance company, whose agent has informed an applicant for a policy that a certificate of membership in a co-operative society is not considered insurance, will be estopped from alleging, in defense to a suit on the policy, that such a certificate is insurance within the meaning of a question in the application as to other insurance . . . 135

PHRASES.

"Their children," designating the beneficiaries under a wife's policy, in the event of her death, mean the children common to both the insured and his wife 407

"Related to," "relations" and "next of kin," when used in life policy, includes only relations by blood, and not connections by marriage 623

WIFE'S POLICY.

Taken out when the insured was perfectly solvent, cannot be applied to the payment of the indebtedness of the insured to the estate of his wife 407

LIMITATION.**ADVERSE POSSESSION**

Will not affect the holder of a certificate of purchase of land from the United States until his patent is issued 135

DEMAND NOTE

Is subject to the running of the statute from its date, though no actual demand has been made 206

NUISANCE.

Culvert under a railroad embankment, which injures adjoining land by discharging water on it, is a continuing nuisance, and an action of damages for maintaining such nuisance is not subject to the bar of the statute 271

LIQUOR DEALERS. See **LEGAL HOLIDAYS.**

LIQUOR LAWS. See **INTERSTATE COMMERCE.**

DRUGGIST

Authorized to sell intoxicating liquors upon a proper application, has a discretion to refuse to sell, and is not liable in an action of damages for such refusal 206

LICENSE

To sell liquors for a year is not a contract, but a police regulation, and the license fee may be raised before the expiration of the year . . 206

MINORS.

Purchase of intoxicating liquor for a minor by a bystander with the minor's own money, at the liquor seller's suggestion, is in effect a sale to the minor 271

LOUISIANA.

At the cession of the territory to the United States, the laws of Spain were in force 1
 The civil law still retained 2
 The Treaty of Paris naturalized all the citizens 2
 First government 2
 Territorial government 3
 Sketch of the laws of 7
 Jurisdiction and procedure of the Courts 9
 Insolvent laws of the State are of Roman origin 12
 Court practice 14
 Peculiarities of the State laws in contrast with those of other States 19

MARSHAL. See **CONSTITUTIONAL LAW.**

MASTER AND SERVANT. See **DEPOT COMPANY.**

ASSAULT AND BATTERY.

Committed by a servant while endeavoring to take his master's personal property from the possession of a person who claims to own it, renders the master liable in damages 408

BOARD OF COMMISSIONERS.

Incorporated to furnish a city with water, is not liable for injuries received from the negligence of its servants 271

CATTLE.

Statutory lien upon, cannot be acquired by a servant who is employed to tend and feed the cattle of his master 623

CHILD OF TENDER YEARS

May recover from his master for injuries received from machinery which the master negligently ordered him to oil 623

DANGEROUS BUSINESS

Requires the employer to know the character and extent of the danger and to warn his servant specially and unequivocally 206

ELEVATOR HAND

Must be provided by his employer for a reasonable length of time with a competent instructor, and the master will be liable to his servant

MASTER AND SERVANT—(continued.)

for any injury resulting from the negligence or incompetency of such instructor 271

FELLOW-SERVANT.

Bridge watchman is not a fellow-servant with the engineer and conductor of a train 206

Train dispatcher is not a fellow-servant with train hands 335

Yard switchman is not a fellow-servant with a locomotive engineer 335

Foreman, who is ordered to remove a barge from the water, is not a fellow-servant with a laborer employed in such work 271

Carpenter, porter and stewardess of a steamship are fellow-servants 334

LATENT DEFECTS

Servant is not bound to know 206

MECHANIC'S LIENS.

REPLACING DEFECTIVE HEARTHS

In a house previously completed does not extend the time for filing a lien 623

SUB-CONTRACTOR

Is bound by an agreement of the principal contract—that the property shall be built and delivered to the owner, free of all liens 408

MERCANTILE AGENCY. See LIBEL.

Liable for a loss occasioned by an error in its published book, when such error arises in printing the book, and not in collecting information for it, notwithstanding a contract exempting it from liability for the negligence of its officers and agents 408

MINERALS.

Oil is a mineral under the Pennsylvania Act of 1850 109

Reservation of all minerals in a deed does not include petroleum . 109

MONTANA. See LEGISLATURE.

CANVASS.

Act of Congress, and Constitution and Ordinances of the Constitutional Convention of Montana, declare who shall canvass for votes at the election for the approval of the Constitution and choice of the first State officials 223

MORTGAGES.

DECLARATION

Of grantee when insufficient to convert a deed, absolute on its face, into a mortgage 623

HOMESTEAD.

Mortgagee of homestead and other real estate must exhaust all the other property before resorting to the homestead to satisfy his mortgage 71

PARTNERSHIP.

Mortgage made to, in the firm name, is valid 624

STATE.

Mortgage by, cannot be enforced, as a State cannot be sued . . . 271

MUNICIPAL CORPORATIONS.

BONDS.

Interest on municipal bonds ceases when they fall due and the means are provided for their payment 206

When issued pursuant to Act of the Legislature authorizing certain commissioners to borrow money on the faith and credit of the town, and execute bonds thereof, after a majority of the tax-payers have assented thereto, which fact is to be proved by affidavit, prevent defenses arising out of these facts 376

MUNICIPAL CORPORATIONS—(continued.)**BOOKS AND RECORDS**

Not private	50
The doings of, and of their officers, and the records and files of, are open to public inspection	50
No special interest need be shown	50
Public officer has no exclusive right to examine	50
Inspection not to be charged for, unless made by officer, or his subordinates	50

CONTRACTS OF.

Exclusive contract for lighting the streets with coal gas, is not infringed by permitting electric lights on the streets and in stores	115
Exclusive contracts with gas companies are valid, but subject to the State's police power	117

HOLDERS OF BONDS OF.

Purchasers in open market, without notice, are <i>bona fide</i> holders	380
Irregularities or defects not apparent, do not prejudice the right of <i>bona fide</i> holders	381
Excess of issue over constitutional limitation of indebtedness does not invalidate	381
Irregularities in calling the election required by law does not invalidate	381
Notice of defects is not to be imputed to holder from pendency of litigation over the issue of the bonds	382
Estopped by recitals	382
In aid of railways, valid in the hands of a <i>bona fide</i> purchaser	382
Latent defects in execution are not a defense against <i>bona fide</i> holders	382
Want of power to issue the bonds affects the right of <i>bona fide</i> holders	383
The municipality is not estopped by recitals	383-384
Excess of constitutional limitation of indebtedness affects a <i>bona fide</i> holder	383
Unconstitutionality affects a <i>bona fide</i> holder	384

MUTUAL BENEFIT INSURANCE.

Insanity considered as within the phrase "sickness or other disability," so as to entitle the member to benefit	334
---	-----

NATURALIZATION.**CANCELLATION.**

Certificate obtained by fraud in a State Court, will be cancelled in a Federal Court	795
--	-----

NATURAL GAS.

An article of commerce whose transportation cannot be restricted by State laws	117
Belongs to the owner of the ground, until it escapes	93
Pennsylvania Act of 1885	102

NATURAL GAS CORPORATIONS.

In Pennsylvania, are incorporated under General Laws	104
Use of public street or country highway by a natural gas corporation is an additional burden and must be compensated for	105
The owner of land may lay a pipe under the easement of a railroad company	105
Ejectment will lie against the lessee as his interest is considered corporeal in Pennsylvania	105
The usual rules of negligence apply to natural gas	107
In Pennsylvania such corporations are subject to municipal regulation	107
Must make reasonable rates	109
In the absence of expert evidence, a court will not decide that natural	

NATURAL GAS CORPORATIONS—(continued.)

gas is included in lease to mine for petroleum, rock or carbon oil, or other valuable substances 114

EMINENT DOMAIN.

The right of, granted to natural gas corporations in Pennsylvania, is within the constitutional power of the Legislature 102

LEASES.

Construction of various 110

STREETS, USE OF.

Municipal contracts may be avoided by City Council if not warranted by charter 116

WAY, EXCLUSIVE RIGHT OF,

May be void as contrary to public policy, and imposing an unreasonable restraint upon trade 117

NATIONAL BANKS.

JURISDICTION OF FEDERAL COURTS.

May be sued, or bring suit, in the Federal Courts by or against a citizen of another State from that in which the bank is located, when the amount involved reaches the statutory limit 206

Suit by stockholder of, against its officers and directors, all of whom are residents of the same State with such stockholder, to compel the collection of a note due the bank and the payment by the directors of sums lost by reason of their alleged illegal conduct, is not within the jurisdiction of the Federal Courts 407

NEGLIGENCE.

CONTRIBUTORY NEGLIGENCE. See RAILROADS.

Not chargeable to a pedestrian who, being aware of defects in a sidewalk, abandons it for the roadway 71

Is chargeable to one who rides with another in his wagon, by the latter's invitation and not for hire, and fails to warn the driver of their approach to a dangerous railroad crossing, which he knows well and might have seen, if he had exercised ordinary care 71

Is chargeable to one who stands between two tracks of a cable company and attempts to board a car on one track without watching for cars coming in the opposite direction on the other track 272

Going upon a railroad track with knowledge that a fast train is due, is 795

Is not chargeable to a shipper of stock who uses the only platform provided by a railroad company for that purpose, although he knows it to be unsafe, but who exercises reasonable care in its use 272

Is not chargeable to one who, having been placed, through the negligence of another, in a position of danger, does not exercise coolness and presence of mind in trying to escape from such danger 334

DEFECTIVE BRIDGE.

Opened by a municipality for public travel, renders it liable for damages, although one side of the bridge may have been perfectly safe 272

FIREWORKS.

Negligent discharge of, will render the persons in charge of the display liable for the injuries thereby inflicted 272

NOTICE

Of the dangerous condition of a building is not necessary to charge the owner with liability for injuries sustained through its falling . . . 272

NOTARY PUBLIC.

WOMAN

Cannot be a notary public under the Massachusetts law 334

NUISANCE.

None *per se*, when the defendants are making a lawful use of their franchise 551

OIL. See DAMAGES, MINERALS.**DEFINITION.**

Oil not synonymous with gas 11

PROPERTY IN

A well sunk by the owner is his exclusively 11

Not analogous to the surface owner's right in running streams of water 11

Taken out by wrong-doer, remains the property of the well owner 11

SEVERANCE OF,

From the freehold, does not divest the owner of his title 10

OYSTERS.

Natural oyster-bed as distinguished from artificial is not one planter and constituting a mass or stratum 33

PARTIES TO ACTION.**CONFLICT OF LAWS.**

Administrator appointed in Maryland cannot sue in Maryland under a West Virginia statute for the death of his intestate caused by negligence in West Virginia 40

PARTNERSHIP.**CONVERSION. See SURVIVING PARTNER.****DISSOLUTION.**

Decreed in equity where party has been induced to enter into through fraud or deceit, or business cannot be worked at a profit . 551

EXECUTOR

Carrying on, with the surviving partner with testator's assets as directed by the will, not liable personally for the old firm's debts . . 551

INTEREST ON CAPITAL.

Charge of, does not convert an agreement, otherwise constituting a partnership, into a relation of debtor and creditor 624

REAL ESTATE.

Purchase of, by a surviving partner under an attachment in a suit brought by him for a partnership debt, at the sheriff's sale, does not make such property real estate descendible to the heirs 795

PASSENGER. See COMMON CARRIERS.**PATENTS AND INVENTIONS.****EXPIRATION**

Between the service of the bill for infringement and the return day bars relief in equity 551

LICENSE.

To use cannot be revoked, when it does not contain a revocation clause, and licensor must resort to action at law 795

REVOCATION. See LICENSE.**PEDDLING.**

Statute prohibiting, is valid 405

But peddling without a license cannot be forbidden to citizens of another State 621

POLICE POWER OF THE STATES.**See INTERSTATE COMMERCE, STATE POWER.**

Must yield to the commercial power of the United States 425

Not delegated to the United States, and not prohibited to the States, and consequently reserved to the States 426

Congress cannot exercise police powers within a State; though a State cannot by its police power, prevent interstate commerce . . 741

The Supreme Court of the United States will uphold State police regulations, when enacted in good faith and appropriate to the protection of life, liberty and property 741

A provision in an internal revenue act, fixing the flashing point of illuminating oil, is of no effect in a State 741

POLICE POWER OF THE STATES—(continued.)

- A patent for illuminating oil, is no defense for violating a State regulation forbidding the sale of such oil 711
 A State cannot collect the expenses of maintaining paupers, or of exercising its police laws, by a tax on immigrants 460

POST OFFICE.**NON-MAILABLE MATTER.**

- A postal card, on which is written a demand for a debt, coupled with a threat to place the account with a lawyer, or law agency for collection, is non-mailable matter under the provisions of the Act of Congress of September 26, 1888 582
 But a demand for a debt may be written upon a postal card, if couched in respectful language, and not put in such form as to attract public attention or make it offensive to the person addressed . . . 582
 The Acts and the cases under them considered 585-592

PAYMENTS BY MISTAKE

- Made by the Post Office Department to contractors, may be recovered back at the suit of the United States 71

PRINCIPAL AND SURETY.**BOND.**

- Surety is liable on bond for accounting by clerk of a District Court ordered under the practice of the Court 551

CONTRIBUTION

- Refused in equity to an administrator of the paying surety after delay of eighteen years 551

INSANITY

- No excuse for delay on the part of co-surety, where trustee appointed 551

PRIVILEGE.**SERVICE OF PROCESS**

- In a civil suit upon one who has been brought from another State by requisition and, after hearing, discharged from custody, but has not left the court room, is void 408

PROCESS. See LEGAL HOLIDAYS, PRIVILEGE.**PUBLIC LANDS.****MILITARY LAND WARRANT.**

- When located, vests the title at once in the holder and locator, and is payment for the land 72

TIMBER

- Unlawfully severed from public lands and purchased by a railroad company, may be recovered back from the latter at the suit of the United States 135

PUBLIC OFFICERS.**HABITUAL DRUNKENNESS**

- Chargeable to an official, so as to render him liable to removal from his office under a constitutional provision, when he drinks to excess six or eight times a year 334

SECRETARY OF THE TREASURY

- May be compelled by *mandamus* to deliver a draft for his compensation to a government contractor, whose work has been approved . 624

PUBLIC OFFICES. See LEGAL HOLIDAYS.**PUBLIC SCHOOLS. See CHRISTIANITY.****RAILROADS. See COMMON CARRIER, MASTER AND SERVANT.****CONTRIBUTORY NEGLIGENCE.**

- Driving for two miles on a railroad track constitutes contributory negligence, and the drunkenness of a person injured thereby does not affect the question of his negligence 135

RAILROADS—(continued.)

Is not chargeable to a passenger in the caboose of a freight train who gets up while the train is in motion and is thrown down and injured by a sudden jerking of the engine 33;
 Stumbling over baggage in the aisle of a passenger car, which could have been plainly seen, will not entitle person thus injured to damages from the railroad company 33;

COUPON TICKET

Over different lines does not render the company issuing it liable for injuries sustained by the holder while riding over one of the connecting lines 7;

FARE. See RETURN TICKET.

Of passenger may be refused after the train has been stopped for the purpose of ejecting him for the non-payment of his fare 207;

FREE PASS,

Exempting from liability, frees the company from responsibility for negligence 386

Conflict in the decisions upon the question considered 391-404

INFANT

Who is injured while trespassing upon a railroad track, cannot recover damages from the railroad company 335

INJUNCTION

Will not be granted against a railroad company upon an allegation that the running of its trains constitute a nuisance to persons residing near its tracks, unless it be shown that there is some abuse or negligent use by the railroad of its franchise 624

INTERSTATE COMMERCE.

Equity has no power to compel a railroad to enter into contract with another road for a joint through rate and routing of freight and passengers under act relating to 548

LIABILITY.

The fact that traveler's goods are lost in a sleeping car does not relieve the railroad company 266

LIVE STOCK.

Lookout for live stock upon its track need not be kept by a railroad company, in order to relieve it from liability to the owners of cattle killed by its trains 135

Statute making the killing of cattle by engines or cars *prima facie* evidence of negligence, applies to cattle yoked to a cart and in charge of a driver 207

LOOKOUT.

Engineer when not passing through an incorporated town or city or crossing a public street or highway, not bound to look out for persons on track 795

NEGLECT

In the emission of sparks from a locomotive can only be rebutted by showing proper appliances were used by a skilled engineer . . . 551

RETURN TICKET.

Condition requiring a return ticket to be stamped and signed at the place of destination before it is used for return passage, is binding upon the passenger presenting it, though he may have failed to read the condition 72

SIGNAL

Need not be given by a railroad train when approaching a private farm crossing 207

Need not be given before starting a train which has been stopped at a point not a station, for the purpose of taking on wood 624

SPEED.

In the discretion of the company when not passing through an incorporated town or passing a public street or highway 795

RAILROADS—(continued.)

STOCKHOLDER

Is not liable for the negligence of the officers, agents or employees of a railroad company in the operation of its road, though the stockholder is another railroad corporation 385

RECORDS. See MUNICIPAL CORPORATIONS.

Right of abstractor to examine municipal 49
 Annual statement of sales for unpaid taxes, made by receiver of taxes, delivered to city treasurer, is a public record 49
 Statutes and decisions affecting the rights of abstract companies and private persons to examine, discussed and considered 60-68
 Alabama 64, 66 Minnesota 62
 Colorado 67 New Jersey 60, 65, 67
 Georgia 64, 67, 68 New York 66
 Kansas 63, 66 Pennsylvania 65
 Michigan 49, 65, 67 Wisconsin 61, 68

REGISTRATION. See ELECTIONS.

RELIGION. See CHRISTIANITY.

RELIGIOUS TEACHING. See CHRISTIANITY.

REMOVAL OF CAUSES.

ACT OF 1887.

Cause in which some of the defendants are residents and others non-residents, wherein there is only a single controversy, cannot be removed under 796

DIVERSE CITIZENSHIP.

When a creditor's bill cannot be removed from a State Court on the ground of diverse citizenship, where one or more of the defendants are citizens of the same State as the plaintiffs 207

LIMITATION.

Extension of time to answer in the State Court does not extend the time to file a petition for removal to the Federal Court 135

LOCAL PREJUDICE

Sufficient ground for removal only when all the parties to the action on one side are citizens of the State where suit is brought, and all on the other side are citizens of other States 72
 Not sufficiently established by an affidavit of the party, stating that he has reason to believe and does believe that he will not be able to obtain justice in the State Court 136
 Causes may be removed from the State to the Federal Courts under Act of March 3, 1887, on the ground of local prejudice 796

SALE.

OLEOMARGARINE

Is sold when served with a meal in a restaurant, although not eaten by the customer 207

WARRANTY

Will not be implied that a specific article of a known and recognized kind and description shall answer the purpose for which it is intended to be used 207

SCHOOLS. See CHRISTIANITY.

SCHOOL ROOM.

A place of worship within the constitutional prohibition as contained in the Fifteenth Amendment 286

SET-OFF.

LOSS OF TRADE

Counter-claim, for, by selling inferior articles when not sustained in action for price of goods sold 552

SHIPPING.**LIMITED LIABILITY ACT**

Of Congress (Act of June 19, 1886) is constitutional 134

NEGLIGENCE.

Vessel using fog horn sounded by the breath, instead of by bellows, is guilty of negligence 795

Vessel running at the rate of seven knots an hour, in a frequent part of the ocean, and in a thick fog, is guilty of 795

PHYSICIAN.

Failure of a freighting vessel to provide is not a neglect of duty . 552

SLANDER.**PUBLIC OFFICERS.**

What words, when spoken of a public officer, are actionable, without averment of special damage, when they impute positive incapacity or misconduct 335

SLEEPING CAR COMPANIES

Liable to the same responsibilities and obligations as inn-keepers, in respect to passengers' goods 251

The security of travelers requires such a rule 251

The previous cases establish a contrary rule 259-265

The difference between, and an inn-keeper pointed out, and the cases examined 265

The question considered with reference to a steamboat owner and the cases examined 265

Not an inn "on wheels" 266

STATUTES. See LEGAL HOLIDAYS.

Right conferred by, upon "all persons," is conferred upon any person 50

STATUTE OF FRAUDS

Does not apply to contract to support a child until of age 796

STEAMBOAT OWNER. See SLEEPING CAR COMPANIES.

The question as to the liability of, as an inn-keeper, considered 265-266

STREETS.

Pedestrian injured by a dangerous nuisance which the city allows a private corporation to maintain in its street, may recover damages from the city 324

SUNDAY LAWS. See LEGAL HOLIDAYS.**RUNNING TRAINS**

On Sunday is not illegal in West Virginia 335

WILL

Made on Sunday is valid 335

TAXATION. See INTERSTATE COMMERCE.**EXEMPTION.**

A school using its receipts for maintenance is within the exemption of a statute relieving the real estate of scientific institutions occupied by them for the purposes for which they were incorporated . . . 136

TELEGRAPHS.**DELAY**

In the transmission of a message, calling the person to whom it is addressed to a dying relative, is not excused by the fact that the telegraph company was not informed of the relationship of the parties 208

HIGHWAY.

Erection of telegraph poles and stringing of wires along a highway already dedicated to the public constitutes an additional servitude for which additional compensation must be made to the owners of the soil 720

TELEGRAPHS—(continued.)**LICENSE TAX**

Cannot be imposed upon a telegraph company engaged in interstate commerce to a greater amount than is necessary to defray the cost of supervising and controlling its wires and poles for the protection of property and person 136

MENTAL SUFFERING

Will not of itself support an action of damages against a telegraph company for the failure to deliver a message 136

RAILROAD COMPANY

May construct a telegraph line over its right of way for its own use and benefit in the operation of its road, without rendering itself liable to the land owners for additional compensation, but not so when the line is constructed for a different purpose 208

UNFAVORABLE ATMOSPHERIC CONDITIONS

Do not excuse the dropping out of words in the transmission of a telegraphic message 272

TENDER. See COMMON CARRIERS.**A VALID.**

Exact amount must be offered 195
Change must not be required 195

WAIVER.

A payee, by saying it will be useless to exhibit the money to him, when such money is present, waives his right to insist that no proper tender was made 93

TONNAGE TAXES.

A State law, authorizing a municipality to collect wharfage from vessels laden with the products of other States and countries, while such dues are not demanded from vessels laden with the same articles when produced in the State, is a regulation of interstate-commerce, and is void 817
The denial to the States, of the power to lay any duty of tonnage without the consent of Congress, was intended to protect the freedom of commerce, and therefore does not invalidate legitimate wharf dues measured by the capacity of the vessels using the wharves 817
Local taxation of vessels by their capacity instead of by value, is unconstitutional 817

TRADE MARKS.**INFRINGEMENT**

Is made out if the defendant's imitations lead to the conclusion that they were methodically intended 796
The words "Warren Hose Supporter," used in connection with a hose supporter connected with a stocking and placed as labels on boxes containing hose supporters, are to be protected as 796

JURISDICTION.

Suit cannot be brought in the Circuit Court for infringing trade marks used in foreign commerce under Act of March 3, 1881, both parties being in the State 796

NAME

Of place where goods are manufactured may be used as a trade mark in combination with other words 208
Of manufacturer may be used as a trade mark, but not to the exclusion of the right of another person of the same name 208

"LIGHTNING"

May be used as a trade mark descriptive of hay knives 335

OLD MACHINES

May be bought by a manufacturer, repaired, repainted and sold again, without removing the original trade mark 336

"SINGER"

Cannot be used as a trade mark for sewing machines 336

TRADE MARKS—(continued.)**"TYCOON"**

Cannot be used as a trade mark for tea 336

TRESPASS.**SEIZURE**

By a mortgagee under a chatte. mortgage void for usury or fraud, is a trespass 552

USURY.**ACTION**

Lies to recover back the difference between the usurious interest paid, and the amount legally due 552

NOTE

Given for certain amount and interest, a less amount being really loaned, is void as usurious 552

VENDOR AND VENDEE.**IMPROVEMENTS**

Put on the property by the vendee in possession are not compensated for when the wife of the vendor refuses to join in the deed for their joint property 552

UNITED STATES COURTS.**JURISDICTION.**

Not conferred upon the Circuit Courts, in actions against the State, involving questions arising under the Constitution of the United States, or by the Act of Congress of March 3, 1875 548

Cannot be conferred upon such courts, in actions against a State with such State's consent, in matters arising out of the Constitution of the United States 549

Supreme Court of United States has no jurisdiction to review the decision of a State Court that a party was not liable in damages when acting within the scope of judicial authority conferred on him by an Act of Congress 270

Have no jurisdiction of proceedings *in rem*, taken under a State statute against the property of a non-resident defendant, who has not been personally served or appeared 130

Have jurisdiction of a suit to set aside a sale of lands forfeited to a State, the parties being citizens of different States, and may avoid a deed for such lands, although made in pursuance of the order of the State Court 134

NO MAN'S LAND

Is subject to the criminal jurisdiction of the United States Court for the Eastern District of Texas 134

UNITED STATES MARSHALS. See CONSTITUTIONAL LAW.

May be arrested by the State authorities on a charge of forgery, while on his way to serve process issuing from a United States Commissioner, if the arrest was not intended to interfere with the service of the process 794

WARRANTY.**IMPLIED.**

None of quality when the goods are to be as made for other persons 552

WATER RIGHTS.**POLLUTION OF SPRING**

By the leakage of oil stored on adjoining premises entitles the owner of the spring to damages from the person thus storing the oil . . 336

WHARFAGE. See TONNAGE TAXES.

WILLS.

Bequest to a corporation not in existence, but to be subsequently created by legislative enactment, is valid 748

CHARITABLE

Use is created by a bequest for the education of "two young men for all coming time" for the Christian ministry 748

COMMUNITY PROPERTY.

Devise to a wife of one-half of all the testator's property, gives her one-half of his moiety of the community property 72

CONTINGENT REMAINDER.

Created by devise of remainder to daughter's children if living at her death 72

CONTRACT TO MAKE WILL.

What evidence is insufficient to establish 336

DEVISE

Of all the estate the testator is to inherit after her father's death, will pass her interest in land inherited from her mother, but subject to her father's curtesy 336

DEVISE OVER.

After a devise to testator's wife, coupled with a power of alienation, will take effect upon any property of the testator not disposed of by her before her death 720

When valid 720

ERASURE

Of a word by the testator in a will, rendering it illegible, and writing another word above it, is inoperative to change or revoke the original provision 624

LAPSE OF LEGACY

Where the legatee dies in the testator's life time, will not be prevented by the legatee bequeathing to his wife his expectant legacy . . . 136

LEAD PENCIL WRITING,

Signed by testator's first name only, may be admitted to probate as a will 208

VESTED ESTATE.

When given 136

WRITS.

Service on a non-resident may be made by publication, where the bill seeks to establish a trust of real estate, even though an account and other relief is also prayed for 795

